(18,354.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 212.

KNOXVILLE WATER COMPANY, PLAINTIFF IN ERROR,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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a Circuit Court, Knox County.

Parties:

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, Tennessee,
vs.
THE KNOXVILLE WATER COMPANY. } No. 24.

Solicitors:
Pickle & Turner for plaintiff.
C. T. Cates, Jr., for plaintiff.

Filed Sept. 6th, 1901.

ALEX. McMILLAN,
Clerk Supreme Court,
By J. G. STUART, *D. C.*

Appeal bond. S. G. Heiskell, security.

M. & A. OF CITY OF KNOXVILLE
vs.
KNOXVILLE WATER CO.

1 In the Circuit Court of Knox County, Tennessee.

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY. } #1363.

Upon the trial of this case before the Hon. Joseph W. Sneed, judge, &c., on this August 9th, 1901, the following is a complete transcript of all the proceedings in said case:

Plaintiff's Evidence.

STATE OF TENNESSEE,
City of Knoxville.

Personally appeared before me, A. S. Birdsing, who being sworn in the form of law, on his oath says that on 5th day of April, 1901, the Knoxville Water Co. a corporation supply- water to the city of Knoxville and its inhabitants, unlawfully charged, demanded and collected of W. K. McClure, for water furnished and to be furnished him, in the city of Knoxville, more than the rates fixed therefor by the ordinances of said city, and affiant therefore charges said Knoxville Water Company, with a misdemeanor, in violation of the ordinances of said city, and prays for a warrant for its arrest, and recovery of the fine and penalty for such offense.

A. S. BIRDSONG.

C. C. NELSON, *Recorder.*

"To any lawful officer of the city of Knoxville, Greeting:

Information on oath having been made to me that the Knoxville Water Co. a corporation, supplying water to Knoxville, and its inhabitants, did violate the ordinances of said city on the 5th day of April, 1901, by charging, demanding and collecting unlawfully of W. K. McClure, for water furnished and to be furnished him by it, in the city of Knoxville, more than the rates fixed therefor
2 by ordinances of said city, approved M'ch 30, 1901, and incurring thereby the penalty of not less than $10.00 nor more than $50.00 as provided by said ordinance.

You are therefore hereby commanded, in the name of the State and Mayor & Aldermen of the City of Knoxville to summon the said Knoxville Water Co., a corporation, to appear before the recorder of said city, or in case of his absence or incompetency before some acting justice of the peace residing in said city, to answer in the premises, and be dealt with as the laws and ordinances in such cases require.

Given under my hand, this 1st day of May, 1901.

C. C. NELSON, *Recorder.*"

Endorsed: No. 3976. The Mayor & Aldermen of the City of Knoxville *vs.* The Knoxville Water Co. Frank Kimball, supt. Issued May 1, 1901. C. C. Nelson, recorder.

Came to hand and executed this warrant by arresting the within-named defendant and bringing him for trial before the recorder.

J. D. SELBY, *Officer.*

Summon as witnesses on part of the city:—W. K. McClure.

THE MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY; FRANK KIMBALL, Supt.

In this case the defendant having pleaded not guilty I heard the evidence, and it is considered by me that he is guilty as charged, and for his offense that he pay into the treasury of the city a
3 fine of fifty dollars, and costs of this cause, and in case he fails to pay or secure the same, I commit him to the workhouse until the same is paid or he is otherwise legally discharged.

Given under my hand 2 day of May 1901

C. C. NELSON, *Recorder.*

Appeal prayed May 2, 1901.

C. C. ——, *Recorder.*

Filed May 18, 1901.

R. A. BROWN, *Clerk.*

In the Circuit Court of Knox County, Tenn.

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY. } # 1363.

Pleas by the Defendant.

First.

Now comes the defendant and says it is not guilty of the alleged crimes charged against it in the warrant in this cause.

CHARLES T. CATES, JR., *Attorney.*

Second.

And for further plea in its behalf defendant Knoxville Water Company specially pleads and avers that the ordinances claimed by plaintiff to have been passed and approved by it on the 30th day of March, 1901, being the ordinance referred to in the warrant of the recorder herein, is void and not enforceable against defendant because it violates the Constitution of the United States, in that it impairs and violates the obligations of the contracts existing between said plaintiff and defendant, certified copies of which are here shown to the court as Exhibits "A" and "B" to this plea and made part of the same, and which contracts defendant avers are legal and
4 binding upon plaintiff and provide a schedule of rates and charges in all respects reasonable and just, which this defendant under and by virtue of said contracts has the right, and at the institution of these suits had the right to enforce.

CHARLES T. CATES, *Attorney.*

Third.

And for further plea in its behalf the defendant Knoxville Water Company says that the ordinance claimed by plaintiff to have been passed and approved on March 30, 1901, being the same ordinance referred to in the warrant of the recorder and sought to be enforced against this defendant is invalid because it is oppressive and unreasonable in that:—

1st. Under and by two certain contracts and agreements duly and legally entered into and executed by plaintiff and defendant on the 1st day of July, 1882, and 20th day of October 1899, respectively, certified copies of which are shown to the court as Exhibits "A" & "B" to defendant's second plea, herein—the defendant being unable to produce the originals—the plaintiff hath the right to purchase all the property, rights, franchises, and privileges of defendant upon a valuation and appraisal thereof to be made by a board of appraisers to be chosen by said plaintiff and defendant, who shall determine the price to be paid by plaintiff by taking into consideration all the rights, privileges, franchises, easements and other properties belonging to defendant, including the right to charge and collect from its

consumers the reasonable and just schedule of rates provided in said contracts, which constitute a material part of said contract and were intended to be considered by said board of appraisers, in determining the value of the plant and property of defendant, and the plaintiff by said ordinance of March 30, 1901, seeks to depreciate and does depreciate the value of the property of defendant to the end that said plaintiff may acquire and purchase the same below and under its real value.

2. And said ordinance of March 30th, 1901, is further unreasonable and oppressive in that it permits plaintiff, without the consent of the defendant, to arbitrarily reduce the reasonable and just price which said plaintiff under and by its said contract of July 1st, 1882, and October 20, 1899, agreed to pay to defendant for water furnished by it to said plaintiff, and which defendant since the execution of said contract has been, and still is engaged in, furnishing to plaintiff.

3rd. And said ordinance is further oppressive and unreasonable because under and by its terms and provisions defendant is prevented from contracting and entering into agreements with its customers for reasonable and just prices for water sold by defendant to said customers and patrons and under a heavy penalty prevented from demanding or collecting such charges as it may enter into with its patrons, for water to be furnished to them by defendant.

4th. And said ordinance of March 30, 1901, is further oppressive and unreasonable because under its terms and provisions, defendant will be deprived of its property and liberty without due process of law.

Wherefore said ordinance is void and not enforceable against this defendant.

CHARLES T. CATES, JR., *Attorney.*

Fourth.

For further plea in its behalf, defendant says that under and by virtue of the contracts existing between plaintiff and defendant and the power thereby as well as by its charter conferred upon defendant it had entered into many contracts, viz:—a thousand or more with its patrons and customers living within the city of Knoxville, and said patrons and customers had agreed to pay for the water so to be furnished at the reasonable and just price theretofore fixed by said contracts, which in all respects conformed to and were within the prices fixed by the contracts existing between the plaintiff and the defendant at the date of the passage of said ordinance of March 30, 1901, yet plaintiff under and by said ordinance of March 30, 1901, attempts to levy a penalty of fifty dollars, and in no case less than ten dollars, against the defendant for every charge, demand or collection by defendant of a sum in excess of the rates set forth in the first section of said ordinance, which rates are lower than the rates prescribed by the contract executed by plaintiff and defendant October 20, 1899, and the contracts existing between defendant and its customers as aforesaid, without regard to the said

contract between plaintiff and this defendant and without regard to the reasonable and just prices fixed and agreed upon by and between defendant and its customers for water to be furnished to them.

Wherefore said ordinance is oppressive, uncertain and unreasonable and therefore void.

CHARLES T. CATES, JR., *Attorney.*

Fifth.

And for further plea in its behalf, defendant says that the penalty imposed by said ordinance of March 30, 1901, is excessive and repugnant to the constitution of the State of Tennessee, and the United States, in that it permits plaintiff to arbitrarily assess against defendant a penalty of fifty dollars for every charge, demand and collection by defendant from the consumers of water furnished by it in excess of the schedule of rates prescribed in the first section of said ordinance without regard to the contracts and agreements existing and in force at the date of the passage of said ordinance and the institution of this suit, between defendant and its said consumers, and without regard to the difference in amounts between the
7 rates sought to be prescribed by said ordinance, and the rates and prices agreed upon and in force by and between defendant and its said consumers.

CHARLES T. CATES, JR., *Attorney.*

Sixth.

And for further plea, the defendant says it does not owe the plaintiff as it has alleged in the warrant in this cause.

CHARLES T. CATES, JR.

The pl'ff comes by att'y and takes issue on all the foregoing pleas.

PICKLE & TURNER, *Att'ys.*

EXHIBIT "A" TO DEFENDANT'S SECOND PLEA.

KNOXVILLE, TENNESSEE:

Articles of Agreement for the Construction of Water Works for the City of Knoxville.

This memorandum of agreement, made and entered into this 1st day of July, 1882 by and between the Knoxville Water Company of said city, in the State of Tenn. party of the first part and the board of mayor and aldermen of the city of Knoxville, Tennessee, party of the second part, witnesseth:—

That the said company in order to supply the said city with water for fire protection and public sanitary and domestic purposes does hereby agree:—

I.

1st. That it will erect and establish upon and on the land acquired by said city for that purpose a system of water works with

reservoir, and all proper and necessary mains, pipes, hydrants, machinery, buildings and other appurtenances and incidents necessary and sufficient to supply said city with water (to be taken from the Tennessee river at the site purchased by the city for that purpose) for all purposes hereinafter stipulated, the said water works and every part thereof to be of the best standard material and constructed in a proper and good workmanlike manner, not inferior to or of less capacity but in every way as good, ample and sub-
8 stantial and of equal dimensions as contemplated and required by the specifications schedules, drawings, maps and details, prepared for the city aforesaid by one Moses Lane; nor shall any of the mains, pipes hydrants, buildings, machinery, pumps and other appurtenances be of quality inferior to that contemplated by said plans and specifications, schedules, drawings, maps and details, a copy of which is now on file in the office of the city engineer of said city, and is hereby referred to and made part of this agreement.

2nd. The reservoir shall be built on the site indicated in the said Moses Lane map, and shall have a capacity of three millions, two hundred thousand gallons of water, as per specifications of said Moses Lane.

3rd. Said company will erect and establish seventy-five hydrants, twenty of which shall have double nozzles, with threads cut to suit the hose connections now in use in the city aforesaid, the same to be located on the line of the main pipes, at the points and along the curb lines of said city, as indicated by a map of the city drawn by the city engineer and prepared for water-works purposes, by Moses Lane, which provides for the placing of sixty-three fire-hydrants, the remaining twelve hydrants to be placed at such other points along said curb lines as may be determined by the city previous to the laying of the pipes, which are to supply the hydrants with water; and said map is also hereby made a part of this agreement for the purposes mentioned. And the said company will erect for the use of said city from time to time, as the city may direct and at such points as the city may designate, as many additional hydrants as the necessity of the city may require, provided, however, that any additional hydrants thus erected shall not be located at a distance exceeding six hundred feet from an existing hydrant or from each other.

9 4th. And the said company guarantees that the said water works and fixtures throughout shall be of first-class material as hereinbefore stated, and capable of supplying two millions gallons of water every twenty-four hours, and shall afford an uninterrupted daily supply to said city, of such quantity thereof as shall be required (not exceeding the amount above specified, except in cases of unavoidable accident or injury to the works of the company, which shall be repaired in the shortest practicable time.

5th. Said company will furnish water free of charge, except the rental of hydrants as herein stipulated) from the hydrants for the sprinkling of the streets and flushing of gutters and sewers along, on and under such streets of said city as are or may be curbed, guttered

Sprinkling streets.

or sewered. Provided, that in flushing not more than two of said hydrants shall be opened and used therefor at one time; also said company will furnish free, through said hydrants, water for all purposes of the fire department and for supplying the city hall building and offices and prisons therein.

Purposes of fire dept. city hall bldg. & prisons therein.

6th. Said company hereby agree to purchase from said city the property already acquired by the city for the purpose of erecting water works, including lands, plans, specifications, drawings, maps etc., etc., and to pay therefor within thirty days from the execution of this agreement and before commencing the construction of said works, the sum of seven thousand eight hundred dollars.

7th. Said company will supply private consumers with water at a rate not to exceed five cents per one hundred gallons, provided, however, which is expressly understood that the entire cost of introducing from the mains into private premises including cost of meter when used, shall be borne by the parties introducing or ordering the same, and that no main or distributing pipe shall be tapped by any person, except a plumber licensed for that purpose by said company.

5 cts. per 100 gals.

Plumber licensed for that purpose by said comp.

6th. The work of construction shall be commenced within thirty days from the execution of this agreement and shall be pushed forward to completion with all reasonable expedition so as to be in operation and prepared to supply the city, water, in the quantity hereinbefore stipulated, within twelve months after the time specified for commencing work, provided, however, that if the company shall at any time during said period of twelve months be delayed from working or restrained therein by injunction or other legal process or order, sued out or obtained by the city, or any of its citizens, or by any ordinance of said city, the time during which the company may be restrained or delayed shall not be included or reckoned in computing said period above fixed for completing said works.

9th. Said company will at its own expense repair, replace and *restor-* all the streets, lanes, alleys, ways and sidewalks in, through or under which it may lay its mains, pipes and other appurtenances, necessary for the erection and maintenance of the works with all convenient and reasonable expedition and as fully and completely as before excavation, provided, that when any part of any street, lane alleyway or sidewalk is used for making excavations or such other work is done thereon as is necessary for the erection and maintenance of said water works, it shall be done in such manner as to give the least inconvenience to the inhabitants of the city.

To restore all streets in as good condition as before excavation.

And said company further binds itself to observe all precautions necessary for preventing accidents, whether the same are prescribed

by ordinance or not. And the said water company covenants to indemnify and save harmless the said party of the second part against all damages, which may be adjudged against said party of the second part for any injuries to person or property accruing through the negligence or want of due care and precaution of the company in opening, keeping open, lighting or closing excavations or placing or removing obstructions in or upon the streets of the city of Knoxville, provided, that the said party of the second part shall in all cases make diligent and proper defense to any suits that may be brought against the city for injuries accruing, as aforesaid, from the negligence of said company and shall not compromise or submit to arbitration any such suit or a use without the express consent of said company.

Suits, accidents, damages, &c.

11

10. Said company will maintain the water works herein stipulated to be built, in such condition as may be sufficient and necessary to enable it to comply with its undertakings herein set forth, for the period of thirty years from January 1st, 1883 unless the city shall become the owner of the same within that period, as may be done in the manner hereinafter stipulated.

30 yrs. from 1st Jan'y 1883.

11th. And said company hereby agrees forthwith to take steps to so amend its charter and within one month so to amend the same as to prohibit it from issuing bonds in excess of one hundred and twenty-five thousand dollars for the period of five years from the execution of this agreement and after that time from issuing additional bonds in excess of twenty-five thousand dollars: and it is agreed that the indebtedness of the company by bond shall not exceed the amount of one hundred and fifty thousand dollars, only one hundred and twenty-five thousand of which can be issued within the said period of five years.

To amend charter.

12th. And the said water company will at its own proper expense construct and establish in connection with the water works, a system of telegraphic fire alarms of such quality and efficiency as that in general use in cities, consisting of two alarm boxes in each of the present eight wards of the city, located at such points as the city shall designate with proper telegraphic connections with a central station, which the company will establish at the city hall, the central station having proper telegraphic connection with the pump works of the company, so that the additional quantity of water required may be supplied by the engine — the main leading to the site of the fire and the central station may be properly connected with the engine-house of the city.

12

And the said city in consideration of the premises on its part covenants and agrees:—

1st. To grant and guarantee to said company all right to enter upon any and all streets, squares, lanes, alleys under the control of the authorities of said city, for the purpose of laying pipes, mains etc., and making repairs of said works, to take up pavements and

sidewalks on the same and to make such excavations therein as may be convenient or advantageous and necessary for the purposes aforesaid; and the right and privilege to lay pipes &c., on, across or through bridges and culverts of the city for conducting and distributing water for public and private uses:—

Provided, however, that the company shall perform their agreement as set out in section nine, hereinbefore written; and the city does also further grant the right of way through all public grounds and places controlled by it to the contractors, free of cost, so far as the same may be necessary or advantageous for the erection, construction or maintenance of the said water works.

2nd. The city further obligates itself not to grant to any other person or corporation, any contract, or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes, or alleys or other public grounds for the purpose of furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st day of August, A. D. 1883, provided the company comply with the requirements and obligations imposed and assumed by them under and by virtue of this agreement.

3rd. The city further covenants and agrees to pay to said company for rent of the seventy-five hydrants hereinbefore stipu-
13 lated to be erected, fifty dollars each per annum, payable in quarterly installments on the last day of each quarter, beginning on the day upon which the city shall commence receiving a supply of water from said works, and for any additional hydrants erected for the use of the city it will pay in the same manner at the rate of not more than fifty dollars each per annum.

4th. The city will by ordinance give to such company such protection against injury, whether by negligence or unwarranted or malicious interference or interruption of any kind, as the legislative department of the city may lawfully do under its charter and the laws of the land.

5th. And upon payment by said company of said sum of seven thousand, eight hundred dollars, as provided hereinbefore in section six, said city binds itself to execute to the company a proper deed with covenants of seizure, freedom from encumbrances, further assurance and general warranty, to all property conveyed to the city for water-works purposes by the following persons, to wit: First by Catherine and Mary Shetterly, by deed dated Sept. 16 1879, registered in Book "T" vol. 3rd, page 50 register's office of Knox county, Tennessee. Second by W. A. Henderson and Peter Staub, by deed dated Sept. 8th, 1879, registered in same book page 52, Third—by S. T. Atkin, by deed dated Sept. 8th, 1879 registered in same book page 53. Fourth: by A. S. Prosser and others by deed dated Sept. 15th, 1879, registered in same book, page 48. Fifth: by H. W. Hall by deed dated Sept. 8th, 1879, and registered in same book page 54, and also all rights of way for the use of the water works which may have been secured by the city therefor during the year 1879.

6th. And the said board of mayor & aldermen in view of the

benefit and advantage accruing to the city and its citizens from the construction of said works and the erection of said hydrants, covenants and agrees with the said water company to pay in addition to the annual rent of fifty dollars as hereinbefore provided, and as an additional annual rent for the said seventy-five hydrants, a sum equal to that which, under the laws of the State and the ordinances and resolutions of the city would be annually assessed as taxes for city purposes and uses on property of the same kind, quantity and value as that owned by the said water company within the corporate limits of the city of Knoxville.

Provided, that the said additional annual rent shall only be paid for the term of five years next following 1st of August, 1894 and no longer.

III.

Expiration 15 yrs. city can buy.

1st. And it is hereby mutually agreed and understood that at the expiration of fifteen years from the time hereinbefore fixed for the completion of said water works, the city shall have the right, upon giving one year's notice of such purpose and intention, to purchase from said company the water works herein provided for, and all the property, rights franchises and privileges thereto belonging by negotiations if thus the terms can be agreed upon, or if not, then at any time for a consideration to be fixed and determined by appraisers; and if not purchased at the end of fifteen years, the said works property and franchises, rights, privileges, etc. may upon the same terms and conditions, and in the same way be purchased by the city at the expiration of each and every year thereafter. But in no case shall such right or purchase exist or be exercised unless due notice thereof be given by the city to the company one year before the expiration of the period aforesaid or either of them. And in the event of such notice and the failure of the parties hereto to agree upon the terms and conditions of sale, the price to be paid and other matters necessary to close the sale, then in that event each party shall choose

Each to choose 2 parties.

two disinterested persons non-residents of said city and also of the county of Knox in the State of Tennessee, and the four thus chosen shall select a fifth person likewise disinterested and a non-resident of Knox county, and said five persons thus chosen shall constitute a board of appraisers and having accepted their appointment, shall each take and subscribe an oath to act fairly, honestly and impartially in the premises, and having so done, shall proceed to value and appraise the water works aforesaid, and all the rights, privileges, franchises, easements and other property appurtenant to said water works belonging to said company, and also to ascertain, determine and declare the amount of indebtedness of said company, or of which its successors or assigns would become liable, and in view of such indebtedness shall decide, determine and award the net value of said water works and all other property of said company appurtenant thereto aforesaid. And such award of said

board of appraisers or that of a majority thereof shall be final and conclusive upon the parties. And when the purchase price so fixed and determined shall be paid to said company by the city, then said company shall and will forthwith by proper deeds of conveyance, assign, transfer set over and convey to said city of Knoxville, said water works, and all the rights, franchises, easements, privileges and other property appurtenant thereto owned by said company at the date of such appraisal and award.

2nd. And it is further understood and agreed by and between the said parties that the said Knoxville Water Company shall not transfer, set over or assign the contract hereinbefore made for the construction of water works to any company, corporation or individual whatsoever; provided, that nothing herein contained shall be construed as prohibited or restraining the said Knoxville Water Company from mortgaging or conveying in trust the lands, easements, estate, rights, privileges and franchises herein granted and agreed and contracted to be granted for the purpose of securing the bonded indebtedness of said company (subject as to the amount to the provisions hereinbefore stated) as as prohibiting or restraining
16 said water company from subletting or agreeing with subcontractors for the construction of any portions of the said water works, or agreeing with any person or corporation for furnishing material or apparatus therefor.

3rd. And it is further mutually understood and agreed by and between the company and the city that a penalty bond this day executed by the Knoxville Water Company as principal and Sam McKinney as surety, to the board of mayor & aldermen of the city of Knoxville, conditioned in the sum of twenty-five thousand dollars, for the construction at and within the limits of the city of Knoxville, — a system of water works in accordance with the plans and specifications of Moses Lane, or in case of failure to pay, satisfy and discharge all such damages as said board may sustain in consequence of said failure, is hereby referred to and made a part of this agreement.

4th. And it is further mutually understood and agreed by and between the said company and the city, that article one of section one of this agreement be amended so as to require that the system of water works hereinbefore provided for shall be built and constructed in accordance with the plans, specifications and drawings of Moses Lane with a single exception, that is to say:—instead and in place of the stand-pipe for fire purposes, at the reservoir as required and contemplated by the plan- and specifications of Moses Lane, the said company shall construct and establish at the reservoir a system of by-pass pipes by means of which the water in case of fire may be directed into the proper main by the direct pressure of the engine of the works.

In testimony whereof, the said Knoxville Water Company has caused this agreement to be signed on its behalf by its president and secretary, and the said board of mayor and aldermen of the city of Knoxville, has caused this agreement to be signed on its behalf

by the mayor and recorder of the city of Knoxville, and has affixed hereto its common seal on the day and year above written.

(Signed) S. E. COOKE,
17 *President Knoxville Water Co.*
ALVIN BARTON,
Sec'y pro Tem.
R. S. PAYNE, *Mayor.*
C. C. NELSON, *Recorder.*

{ Seal Mayor & Aldermen of the City of Knoxville, Tenn. Founded 1792. }

KNOXVILLE, TENNESSEE:

Bond of Knoxville Water Company, 1882.

Filed July 1, 1882.

Know all men by these presents, that we, the Knoxville Water Company, a body politic and corporate as principal and Sam McKinney, a resident of Knoxville, Tennessee, as surety are firmly bound and held unto the Board of Mayor & Aldermen of the City of Knoxville, in the penal sum of twenty-five thousand dollars.

Now the condition of this bond is such that — the said Knoxville Water Company shall within the period of twelve months from July 1, 1882, construct, erect and establish at and within the corporate limits of the city of Knoxville, Tennessee a system of water works in accordance with the plans and specifications of Moses Lane, or in case of failure therein, shall pay, satisfy and discharge all such damages as the said board of mayor & aldermen as a corporation, shall incur or sustain in consequence of such failure, then and in that event, this obligation shall be null and void, otherwise to remain in full force.

In testimony whereof, the said Knoxville Water Company has caused the signature of its president and secretary to be hereunto affixed in its behalf, and the said Sam McKinney has hereunto set his hand this July 1st, 1882.

18 (Signed) S. E. COOKE,
President Knoxville Water Co.
A. BARTON,
Sec'y pro Tem. of Knoxville Water Co.
SAM McKINNEY, *Surety.*

{ Seal Mayor and Aldermen of the City of Knoxville, Tennessee. Founded 1792. }

Filed July 1, 1882.

STATE OF TENNESSEE, }
City of Knoxville. }

I, C. C. —— recorder of said city, do hereby certify the foregoing to be a full, true and perfect copy of the contract it purports to give, made by the city with the Knoxville Water Company, together

with the bond of said company, as the same appears of record on the minutes of the mayor & aldermen of said city now in my office.

Given under my hand at office in Knoxville, Tenn., January 23rd, A. D. 1900.

C. C. NELSON, *Recorder.*

{Seal Mayor & Aldermen of the City of Knoxville, Tenn. Founded 1792.}

Endorsed: Copy. Article of agreement for the construction of water works for the city of Knoxville.

EXHIBIT "B" TO DEFENDANT'S SECOND PLEA.

At the regular meeting of the mayor & aldermen of the city of Knoxville, Tennessee, held Friday, October 20th, 1899.

Amongst other proceedings of said board the following is a copy of an ordinance passed on third and last reading as the same
19 appears of record on the minutes thereof, pages 192-'3-'4-'5, with acceptances, &c. date above given, and the same is in words, to wit:—

"An ordinance authorizing and giving the consent and approval of the city of Knoxville, to the consolidation of the Knoxville Water Company and the Lonsdale Beaumont Water Company, and making changes in certain provisions of the contract between the Lonsdale-Beaumont Water Company and the Town Council of West Knoxville, known as the contract of September 17th, 1892, and also making changes in certain provisions of the contract between the Board of Mayor & Aldermen of the City of Knoxville, and the Knoxville Water Company, dated July 1, 1882.

Be it ordained by the board of mayor & aldermen of the city of Knoxville:—

SECTION 1. That the consent and approval of the city of Knoxville is hereby given to the consolidation of the Knoxville Water Company and the Lonsdale Beaumont Water Company into one corporation under the name of the Knoxville Water Company.

Be it further ordained:

SECTION 2. That such consolidation may be effected by consolidation, purchase, lease or otherwise, under the laws of the State of Tennessee, as may be deemed best by said consolidating companies.

Be it further ordained:

SECTION 3. That said Knoxville Water Company, so succeeding to the rights, franchises and property of the Lonsdale Beaumont Water Company, and the present Knoxville Water Company, may obtain its supply of water to be furnished to its customers, both public and private, from the existing plant and system of the present Knoxville Water Company, or some other plant, system or source equally as good as that now used by the said Knoxville Water Company, and the service thus to be rendered, and the supply so to be furnished
20 shall be deemed and regarded as a satisfactory performance of said consolidated Knoxville Water Company of all obliga-

tions both public and private under existing contracts of either or both of said consolidating companies.

Provided always, said Knoxville Water Company shall furnish to the people living in what is now the tenth ward of the city of Knoxville, (being the territory formerly known as the city of West Knoxville) as well as those that may hereafter live in said territory, clear, good and wholesome water free from all sewage and other contamination equal in quality to that now being supplied by the Knoxville Water Company to the city of Knoxville, at a maximum rate not exceeding that fixed in the ordinance and contract of September 17th, 1892, being the contract between the Lonsdale Beaumont Water Company and the Town Council of West Knoxville, and shall maintain and keep up the pressure provided for in said ordinance and contract. And shall in all other respects maintain and carry out the provisions of said contract, unimpaired except as modified in this ordinance.

And provided further, that said consolidated Knoxville Water Company, succeeding, as aforesaid, to all the rights, privileges and franchises of both companies, shall also furnish to the people living in the remaining wards of the city of Knoxville, other than the said tenth ward, or who may hereafter live in said remaining wards or such wards as may be hereafter added to the city of Knoxville, filtered and wholesome water, or water equal in quality to the filtered water now being furnished by the said Knoxville Water Company, at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the City of Knoxville, dated July 1st, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company.

Be it further ordained:

21 SECTION 4. That the property and franchises which may be obtained by said consolidated company as to the result of said consolidation whether the same be effected by consolidation, purchase, lease or otherwise, shall be subject to the right of the city to purchase the same in as full and complete a manner as the property now owned by the Knoxville Water Company is subject thereto, under the terms and provisions of the contract existing between the City of Knoxville, and the Knoxville Water Company, dated July 1st, 1882, as set forth in said contract of July 1st, 1882, is hereby extended and made to cover all the property, franchises, rights and privileges now owned by the Knoxville Water Company, or which may hereafter be acquired by it, or said consolidated company.

Be it further ordained:—

SECTION 5. That in order that the consolidation hereinbefore provided for may be effected and to enable the Knoxville Water Company and the Lonsdale Beaumont Water Company to fund their existing debts and obligations and to provide funds to improve the consolidated plant and make extensions thereto, and in consideration of the benefit to be derived therefrom by the city of Knoxville, and its inhabitants the Knoxville Water Company shall guarantee or fund the existing debts of said companies, and said Knoxville Water Company is hereby released from that provision of its contract with

the city of Knoxville, dated July 1, 1882, as aforesaid limiting its indebtedness to $150,000. and such provision or limit in said contract is hereby abrogated and annulled.

Provided, however, that not more than eight hundred thousand dollars ($800000) of bonds shall be issued prior to the first day of January, 1901, and provided further that no bonds in excess of eight hundred thousand dollars ($800000) shall be issued except to provide funds for additions to or improvements of the plant and property of said Knoxville Water Company and for any bonds to
22 be so issued, said Knoxville Water Company shall file with the recorder of the city of Knoxville a sworn certificate showing the actual cost of such addition or improvements, for which bonds may be issued.

Be it further ordained:

SECTION 6. That within thirty days after this ordinance takes effect, said Lonsdale Beaumont Water Company and said Knoxville Water Company shall file their several written acceptances of this ordinance in so far as it alters or changes said contract of September 17th, 1892, and of July 1st, 1882, signed by the president and secretary of said companies in the office of the recorder of the city of Knoxville, and thereupon this ordinance shall be and become a part of each of said contracts as fully as if the provisions of this ordinance were embraced in formal written contract made and executed between the City of Knoxville and the said Lonsdale Beaumont Water Company and the said Knoxville Water Company.

Be it further ordained:

SECTION 7. That said Lonsdale Beaumont Water Company and said Knoxville Water Company shall pay for the publication of this ordinance.

Be it further ordained:

SECTION 8. That this ordinance shall take effect from and after its passage, the welfare of the city requiring it."

Endorsed: Approved, October 20th, 1899. (Signed) Wm. Rule, mayor.

Thereafter the following papers of acceptance were filed with the recorder, and ordered entered on the minutes of the board and the same are in words, to wit:—

To the board of mayor and aldermen of the city of Knoxville:

The Lonsdale Beaumont Water Company does hereby accept the ordinance passed on the 20th day of October, 1899, by the board of mayor & aldermen and approved by the mayor on the 20th
23 day of October, 1899, entitled as follows:—An ordinance authorizing and giving consent and approval of the city of Knoxville, to the consolidation of the Knoxville Water Company and the Lonsdale Beaumont Water Company, and making changes in certain provisions of the contract between the Lonsdale Beaumont Water Company and the Town Council of West Knoxville known as the contract of September 17th, 1892, and also making

changes in certain provisions of the contract between the Board of Mayor & Aldermen of Knoxville and the Knoxville Water Company, dated July 1st, 1882. This acceptance is intended to be in pursuance of the provisions of section 6 of said ordinance.

In testimony whereof, we Albert Wheeler, as president, and Frank C. Kimball, as secretary of the Lonsdale Beaumont Water Company do hereby sign and execute this acceptance on this the 20th day of October, 1899.

(Signed) ALBERT WHEELER,
President of the Lonsdale Beaumont Water Company.
FRANK C. KIMBALL,
Secretary of the Lonsdale Beaumont Water Company.

The following appears of record on page 196 of the minutes of the board of mayor & aldermen of the city of Knoxville, at said meeting, Friday, October 20th, 1899, in words, to wit:

"To the board of mayor & aldermen of the city of Knoxville:

The Knoxville Water Company does hereby accept the ordinance passed on the 20th day of October 1899, by the board of mayor & aldermen, and approved by the mayor on the 20th day of October, 1899, entitled as follows:

An ordinance authorizing and giving the consent and
24 approval of the city of Knoxville to the consolidation of the Knoxville Water Company and the Lonsdale Beaumont Water Company and making changes in certain provisions of the contract between the Lonsdale Beaumont Water Company and the Town Council of West Knoxville, known as the contract of September 17, 1892, and also making changes in certain provisions of the contract between the Board of Mayor & Aldermen of Knoxville, and the Knoxville Water Company, dated July 1st, 1882. This acceptance is intended to be in pursuance of the provisions of section 6 of said ordinance.

In testimony whereof, we William Wheeler, as president, and John F. Mulhal, as secretary of the Knoxville Water Company, do hereby sign and execute this acceptance, on this the 20th day of October, 1899.

(Signed) WILLIAM WHEELER,
President of the Knoxville Water Company.
JOHN F. MULHAL,
Secretary of the Knoxville Water Company."

STATE OF TENNESSEE, }
City of Knoxville. }

I, C. C. Nelson, recorder and treasurer of the city of Knoxville, Tennessee, do hereby certify the foregoing to be full, true and perfect copies of the ordinance its purports to give, and the acceptance of said ordinance which it also gives as the same is now of record in my office in the minutes of the board of mayor & aldermen of said city, bearing date, Friday, October 20th, 1899. This ordinance

was published in Tribune and Journal, Oct. 26, 1899, by order of board as to all ordinances being published.

Given under my hand and seal of said city, at office in Knoxville, Tennessee, August 6th, A. D., 1900.

C. C. NELSON,

25 *Recorder and Treasurer of the City of Knoxville, Tennessee.*

{Seal Mayor & Aldermen of the City of Knoxville, Tennessee. Founded 1792.}

Endorsed: No. 1363. Pleas of defendant. The Mayor & Aldermen of the City of Knoxville *vs.* Knoxville Water Co. Filed July 30th, 1901. R. A. Brown, clerk.

Copy from the Record.

MAY 20TH, 1901.

STATE OF TENNESSEE:

Be it remembered that at a circuit court began and held for the county of Knox at the court-house in Knoxville on the 3rd Monday of May, 1901, it being the 20th of said month, present and presiding the Hon. Jos. W. Sneed, judge &c. *when* the following proceedings were had and entered of record, to wit:

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY.

In this cause comes plaintiff by attorney and demands a jury to try this case.

TUESDAY, *July 30th*, 1901.

Court met pursuant to adjournment, present and presiding the Hon. Joseph W. Sneed, judge &c. when the following proceedings were had, and entered of record to wit:

26 MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY. # 1363.

In this cause comes defendant and moves to quash the warrant of the recorder therein because, first: said warrant does not set forth and aver any such state of facts which if admitted to be true would entitle plaintiff to a judgment against this defendant.

2nd. Said warrant does not set forth the ordinance or the substance thereof, which it is alleged has been violated by defendant so that the court may see and determine whether plaintiff hath right of action under it; 3rd; said warrant fails to show but should set forth and aver the substance of the ordinance upon which said warrant is based and the particulars wherein it is claimed defendant hath violated said ordinance.

And said motion having been argued by counsel and considered by the court, and the court being of the opinion that the motion is not well taken, doth overrule the same, to which action of the court plaintiff excepts.

TUESDAY, *July 30th*, 1901.

MAYOR & ALDERMEN OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY. } # 1363.

In this case the plaintiff comes by attorney and by consent of defendant waives its demand for a jury trial, and in lieu thereof demands that on the trial by the court the court will make a written finding of fact and law applicable to the matters in controversy in this cause.

Thereupon it is ordered by the court that this cause be transferred from the jury to the non-jury docket.

AUGUST 9TH, 1901.

THE MAYOR & ALDERMEN OF THE CITY OF KNOXville
vs.
27 KNOXVILLE WATER COMPANY. } # 1363.

This cause came on to be regularly heard on this the 9th day of August, 1901, before Judge Joseph W. Sneed, without the intervention of a jury, who, having heard all the evidence and argument of counsel, and having made a special finding in accordance with the demand of plaintiff heretofore entered in this cause, is of the opinion that the plaintiff, The Mayor & Aldermen of the City of Knoxville, is not entitled to recover of the defendant Knoxville Water Company, for and on account of the matter sued on, doth so order and adjudge; and doth further order and adjudge that plaintiff's suit be and the same is hereby dismissed, and that plaintiff pay all the costs of the cause, for which execution may issue.

M. & A. OF KNOXVILLE
vs.
KNOXVILLE WATER CO. } Order.

In this cause the pl't'ffs came by att'y and moved the court for a new trial, which the court overrules and disallows. The pl't'ffs except to the action of the court and tendered its bill of exceptions which was signed, and sealed by the court and made part of the record.

From the judgment of the court in this case, the pl't'ffs prays an appeal in the nature of a writ of error to the next term of the supreme court to be held at Knoxville, on the second Monday of September next, which is granted upon its giving proper appeal bond. Said bond is accordingly filed and the record is ordered to be certified.

In the Circuit Court of Knox County, Tennessee.

MAYOR & ALDERMEN OF THE CITX OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY. } #1363.

28 *Bill of Exceptions.*

Upon the trial of this cause before the Hon. Joseph W. Sneed, judge &c. on this August 9th, 1901, the following proceedings were had:

Plaintiff's Proof.

Warrant.

Pleas of defendant and exhibits.

Plaintiff offered the ordinance dated March 30th, 1901, as published in the Journal and Tribune of M'ch 31, 1901, and is in the words and figures following, to wit:

An ordinance to regulate the maximum rate to be charged to the consumers of water by any person, firm, company, or corporation in the city of Knoxville.

SECTION 1. Be it ordained by the board of mayor & aldermen of the city of Knoxville, That no person or company, firm or corporation furnishing water to the city of Knoxville, or the inhabitants thereof, shall charge a higher maximum rate per annum or by meter, for water than that set out in the following schedule, to wit:

Private dwellings—per annum—occupied by one family.

Four rooms or less	4.80
Five rooms	5.60
Six rooms	6.40
Each additional room	.50
One bath-tub for one family	4.00
Each additional bath-tub	2.50
One water-closet of approved kind for one family	4.00
Each additional water-closet	2.50
One self-closing urinal for one family	2.50
For each additional urinal	1.50

29 Boarding & lodging houses—per annum.

Six rooms or less	8.00
Each additional room	.50
One bath-tub	6.50
Each additional bath-tub	4.00
One water-closet	6.50
For each additional water-closet	4.00
One closing urinal	4.00
Each additional urinal	2.25

Hotels.

Meter rates.

Stores, offices, warehouses, and workshops.

For general uses not specially rated and requiring not more than ordinary supply of water—per annum.

One faucet for 1 tenant	6.50
Each additional faucet not rated below	2.25

Bakeries—per annum.

Per barrel of flour used daily	4.00
No rate less than	6.50

Barber shops—per annum.

One faucet, one chair	4.00
Each additional faucet	1.50
Each additional chair	1.50
No rate less than	6.50

Baths—per annum.

Public one tub	8.00
Each additional tub	4.00

Dental offices—per annum.

1 faucet, 1 chair	6.50
Each additional chair	1.50
Each additional faucet	1.50

30 Druggists and apothecaries—per annum.

1 faucet	9.50
Each additional faucet	2.50

Soda fountains.

Meter rates.

Tumbler-washers.

Meter rates.

Public laundries.

Meter rates.

Markets—per annum.

1 faucet	6.50 to 9.50
Each additional faucet	2.25

Printing offices—per annum.

Exclusive of water for engine or power	$6.50 to $18.00

Photograph galleries.

Per annum	9.50 to 37.50
Public bar-rooms	8.00 to 18.00

Restaurants and dining saloons—per annum.

Without a public bar..... 6.50

And 40 cents additional for each chair for table guests.

Steam boilers—per annum.

Per house-power..... 2.00

Bath-tub, water-closet, and urinal for private use connected with a store, office, etc. same rate as for private dwellings; those connected with bar-rooms restaurants, office building, saloons etc., same as for boarding and lodging house rates.

Stables.

Livery & sale stables, meter rates.

Private stables per annum, each horse and cow..... 1.50

Hose sprinklers and street-washers.

Rates governed by number of lineal feet frontage and in-
31 cludes the privilege of washing windows, porches and side-walks, and sprinkling lawns, also street in front of the taker, premises at the following rate per annum for each portion of the year as actually used for all the above purposes:

Dwellings, with lawn etc..... 6.50
Fifty feet frontage or less. Each additional 50 feet 3.00

Premises having less than 75 feet shall be rated as of 50 feet, and those having more shall be rated as of 100 feet.

Business houses.

For first 25 feet of frontage, or less 4.50
Each additional 25 feet 2.25

Premises having less than 37½ feet shall be rated as 25 feet and those having more as 50 feet.

Fountains—per annum.

Use limited to 6 hours only per day for 7 months each year.

For a jet of one-sixteenth inch..... 5.00
For a jet of one-eighth inch 8.00
For a jet of three-sixteenth- inch..... 11.00
For a jet of one-quarter inch 25.00
For a jet of five-sixteenth- inch 45.00

Or by meter at the discretion of the company or consumer.

Building purposes.

Mortar for laying brick, per thousand..... $0.08
Mortar for laying stone per cu. yd..... .03
Mortar for plastering per 100 sq. yds ..... .28
Mortar for other purposes, for each cask of lime or cement used ..... .08
Cement sidewalks per 100 sq. ft..... .20

Meter rates.

0 to 50 M gals. monthly per thousand gals..... .18
50 to 100 M gals. monthly 16c. per M gals.
32 100 to 150 M gals. monthly 12c. per M gals.
150 to 200 M gals. monthly 8c. per M gals.
200 to 250 M gals. monthly 7.5 per M gals.
250 to 350 M gals. monthly 6c. per M gals.
350 to 1,000,000 gals. monthly 5c. per M gals.
Above a million gals. monthly 5c. per 1000 gals.

Provided that the charge at any given rate shall not exceed the maximum charge at the next lower rate. Provided that the minimum meter charge shall not be less than $8.00 per annum and meter rent.

Meter rent.

80 cents per annum for each ¾-inch nominal size of meter.

Elevator service.

For amount of water used as registered by the indicator, meter rates are to be charged.

Fire protection.

Automatic sprinklers or hose outlets, used exclusively for fire protection in buildings, for each 1000 sq. ft. of floor space, or fraction thereof, per annum $2.25.

Provided that the amount of water rent paid for other purposes on premises having fire-protection fixtures shall be abated to an amount not exceeding the charge for said fire protection as per above. Fire-hydrants with outlets like or similar to city hydrants, each per annum, $45.00.

And no reduction or abatement on account of water used for other purposes at rate provided therefor.

SEC. 2. Be it further ordained That it shall be a good defence to any action brought against any consumer of water in the city of Knoxville, by any person, company, firm or corporation for the use of water, for such consumer to show that he has paid for the water so used by him at the foregoing rate or tendered the payment of the same before suit was brought with the tender continuing as re-
33 quired by law, in case of tender to date of trial.

SEC. 3. Be it further ordained That it shall be unlawful for any person, company, firm or corporation or their officers, agents, servants or employees supplying water to inhabitants of the city of Knoxville to charge, demand or collect for water so supplied more than the rates hereinbefore set forth in sec. 1 of this ordinance, and it shall also be unlawful for any such person, company, firm, or corporation or their officers, agents, servants or employees to cut off or otherwise interfere with the supply of water to any customer for failure to pay for same, provided such consumer tenders in lawful money the charge for such water at the rates aforesaid and any violation of the provision of this section of this ordinance shall be a

misdemeanor and upon conviction thereof before the recorder, the offender shall be punishable by a fine of not less than ten ($10.00) dollars nor more than fifty ($50.00) dollars for each offense.

SEC. 4. All ordinances or parts of ordinances in conflict herewith be and the same are hereby appealed and this ordinance shall take effect and be enforced from and after its passage, the welfare of the city requiring it.

Passed 3rd and last reading March 30, 1901 A. D.

Approved March 30, 1901.

S. G. HEISKELL, *Mayor.*

Attest: C. C. NELSON, *Recorder.*

City of Knoxville, July 29, A. D. 1901.

STATE OF TENNESSEE, }
Knoxville, Tennessee. }

Office of the recorder of said city.

I, C. C. Nelson, recorder of the city of Knoxville, Tenn., do hereby certify that I have carefully compared the ordinance published in the Tribune and Journal of this city, on March 31 1901, with
34 the copy of the ordinance on the minutes of said board of mayor & aldermen, as passed by them on March 30th, 1901, and find that — is a true and perfect copy of said ordinance, as the same now appears of record in my office on the minutes of said board of above date.

Given under my hand at office in the city of Knoxville, Tennessee, July 29, A. D. 1901.

C. C. NELSON,
Recorder of the City of Knoxville, Tenn.

{Seal Mayor & Aldermen of the City of Knoxville, Tennessee, Founded 1792.}

Mr. CATES: May it please the court, I object to the introduction of this ordinance as evidence because, 1st, the same has never been legally published, 2nd; the paper offered shows that it was published on March 31, 1901, which was on Sunday, and therefore not a valid publication, and 3rd; and because the ordinance never having been legally published is invalid.

The COURT: I will permit the ordinance to be introduced subject to exception and will rule on it later.

The plaintiff then introduced the following evidence:

W. H. MCCLURE, the first witness, being duly sworn, testified as follows:

Examined by Mr. TURNER:

Q. Where do you reside?
A. In Knoxville, Tennessee.

Q. Are you a consumer of water of the Knoxville Water Company?

A. I am.

Q. Does the Knoxville Water Company supply water to Knoxville and its inhabitants?

A. Yes sir.

Q. Makes a business of it?

35 A. Yes sir.

Q. Has the Knoxville Water Company made any demands on you for water supplied and to be supplied to you from and after April 1st, 1901. If so, will you please state what those demands were?

A. On April 9th I paid the Knoxville Water Company for water service at 724 West Church street, Knoxville, Tenn., six-room house and water-closet $3.22 net, for the quarter from April 1st to July 1st.

Q. Where is that residence?

A. On the corner of Church and High streets.

Q. In the old city of Knoxville?

A. Yes sir.

Q. A six-room house you say?

A. Yes sir.

Q. Has it any other water attachments?

A. Only water-closet. And 720 West Church street, $2.62 net, that is by net I mean I paid the water company on this particular date that amount after their discount was taken off. That was a four-room house with a water-closet.

Q. Do you remember what discount was allowed on the bill?

A. Five per cent.

Q. And these are the net amounts you paid?

A. Yes sir.

Q. Where was that house?

A. On West Church street.

Q. In the old city?

A. Yes sir. At the same time I paid $1.43 for 706 High street four-room house, no other attachments than water attachment.

Q. No sprinkling attachments?

A. No sir.

Q. No special attachments?

A. No sir.

Q. Were bills rendered to you by the Knoxville Water Company for these amounts?

36 A. Yes sir.

Q. And have you paid them?

A. Yes sir.

Q. Did you or not pay these amounts under protest?

A. I did not tell them I was protesting. I had protested the previous payments under the other ordinance, but as a matter of fact I did pay it under protest because I knew the ordinance was in existence.

Cross-examination by Mr. CATES:

Q. To whom did you protest these payments?
A. To those who received the money at the Knoxville Water Company.
Q. What did you say in protest of these bills?
A. I simply told them I made protest against the payment of them. I don't mean these particular bills. I made no protest as to them.
Q. You paid the bills and said nothing about it?
A. Yes sir.
Q. Who owns this property?
A. J. S. Gratz.
Q. He was the man who was paying these water bills?
A. No, I paid them myself.
Q. Did you sign the application and contract?
A. Yes sir.
Q. —

Knoxville Water Company, service No. 2850.

KNOXVILLE, TENN., *Sept.* 1, 1896.

The undersigned hereby applies to the Knoxville Water Company for a supply of water at premises, No. 706 High street, owned by J. S. Gratz, occupied by tenant, to be used for domestic purposes only, and I hereby agree to use and pay for the same in accordance with the rates, rules, and regulations of the Knoxville Water Company, as now or hereafter in force, and which are made part of this contract; and I further agree that the said company may enter upon any lands owned by me, or in which I have such right,
37 and place therein, upon the terms provided therefor, all pipes that may be used for furnish- such supply, and may cause the same to be inspected and repaired at any future time as occasion may require.

J. S. GRATZ, *Owner*,
By W. K. McCLURE, *Applicant*.

A. Yes sir I signed that contract.
Q. You made that application and signed that contract?
A. Yes, I never read the contract. You can't get water without signing that contract.
Q. Well you signed this application and contract?
A. Yes, and signed others.
Q. In the same way.
A. Yes sir, I guess so. I refused to sign one at one time, but they would not give me water. You have to sign your birthright away to get water.
Q. You signed this one as to the premises on West Church street, or West Church avenue, which is as follows:—

The Knoxville Water Company, service No. 3422.

KNOXVILLE, TENN., *Oct.* 2, 1899.

The undersigned hereby applies to the Knoxville Water Company for a supply of water at premises No. — W. Church Ave., owned by J. S. Gratz, occupied by tenant, to be used for domestic purposes only, and I hereby agree to use and pay for the same in accordance with the rates, rules and regulations of the Knoxville Water Company, as now or hereafter in force, and which are made part of this contract; and I further agree that the said company may enter upon any lands owned by me or in which I have such right, and place therein, upon the terms provided therefor all pipe that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require.

J. S. GRATZ, *Owner*,
By W. K. McCLURE, *Applicant.*

A. Yes.
Q. You say you paid this money?
A. Yes sir.
38 Q. You were agent of Mr. Gratz?
A. Yes sir.
Q. In collecting these rents?
A. Yes.
Q. Well now, who pays the water rent, the tenant?
A. No sir.
Q. Who were the tenants at that time?
A. I don't remember.
Q. Then it did not come off of you?
A. I charged it up to Gratz. I paid it out of my own private bank account.
Q. And you charged it up to Gratz?
A. Yes sir.
Q. And then the owner of the premises bears the water charge?
A. Yes sir.
Q. And the owner of the premises in these cases paid the water rent?
A. Ultimately so yes sir.
Q. And he paid these charges that you are talking about here?
A. Yes sir.

Re-examination by Mr. TURNER:

Q. Were these bills rendered to you by the water company?
A. Yes sir.
Q. And were paid by you?
A. Yes sir.
Q. You say that your signing of these applications, or contracts which were just read to you, was demanded of you as a condition before they would turn the water on these premises.
A. Yes in every case you have to sign them. They won't turn

your water on if you don't. You cannot get a drop unless you sign one of them.

Q. You made your application for water without signing the contract?

A. I did not want to sign any such contract. But I could not get any water but they require you to sign this contract if you want water no matter what it specifies.

39 Recross-examination by Mr. CATES:

Q. Where was this other property that you wanted the water turned on and could not get it turned on?

A. I think one of these same properties previous to that.

Q. And you were acting in reference to this property as the agent of J. S. Gratz?

A. Yes sir.

Q. And the bills were rendered to you as his agent, and paid by you as his agent?

A. They were rendered to me as an individual and paid by me as an individual, and I charged it up to him on his rent account He paid it in the end.

Q. You collected the rents belonging to J. S. Gratz from these houses and deposited it in your name in the bank?

A. Yes.

Q. And out of these rents you paid his water bills?

A. Out of my own bank account. It did not matter whether there was any rent to his credit or not I paid the water rent.

Q. So he ultimately paid these bills himself?

A. Yes sir, they were charged back to him, and he paid them.

Re-examination by Mr. TURNER:

Q. You paid the water rent in the first instance and then afterwards Mr. Gratz repaid you?

A. Yes.

Recross-examination:

Q. You collected and deposited Mr. Gratz's rents to your bank account and paid the water rent out of it?

A. Yes sir, I paid the water rent.

Q. How often did you collect Mr. Gratz's rents?

A. Every time I can.

Q. What time did you collect them—the first of the month?

A. No it depends on when the tenant goes in.

The COURT:

Q. Does the warrant charge who paid this money?

Mr. TURNER: It charges that demand was made on W. K. McClure and payment made by him.

40 Plaintiff rested.

The defendant then introduced the following evidence:

C. C. NELSON, the first witness being duly sworn, testified as follows:

Examined by Mr. CATES:

Q. Without waiving exception made to this ordinance and stated above, I desire to ask you Squire Nelson, the following questions: You are the recorder of the city of Knoxville?

A. Yes sir.

Q. How long have you been the recorder of the city?

A. I was first elected June 30th, 1882, and succe-ded myself.

Q. And you have been recorder ever since that time?

A. Yes sir.

Q. Then you were recorder on the 1st day of July, 1882?

A. Yes sir.

Q. The date of the original contract between the city of Knoxville and the Knoxville Water Company?

A. Yes sir. The original contract was entered into the night I was elected. That was the first paper I ever got, is my recollection about it.

Q. This Exhibit "A" to defendant's second plea, certified to by you, is a copy of that original contract?

A. Yes sir.

Q. And it was under that contract that the water works were built?

A. Yes sir.

Q. I call your attention to Exhibit "B" to defendant's second plea, and ask you if that is not a certified copy of the ordinance of the mayor & aldermen of the city of Knoxville passed October 20th, 1899, and published by the order of the board on October 26th, 1899?

A. Yes.

Q. And parts of that Exhibit "B" are copies from the
41 records of the acceptance of that ordinance, filed by the Knoxville Water Company and the Lonsdale Beaumont Water Company?

A. Yes sir.

Q. Squire Nelson, on what day of the week was, if you recall, the 30th of March, 1901.

A. I don't remember.

Q. On Saturday, was it not?

A. I don't remember.

Q. Was there a meeting of the mayor & aldermen of the city of Knoxville on March 30th, 1901?

A. I can tell you by looking at the records.

Q. Well that is just what I want you to do—look at it and see?

A. Yes sir.

Q. Was that a regular or special meeting?

A. A called meeting of the board.

Q. Then it was not a regular meeting of the board?

A. No sir.

Q. And there was no regular meeting of the board on that day?

A. No sir.

Q. I will ask you to state Squire Nelson whether the minutes of the board of the special meeting of March 30th, 1901, show that all of the aldermen were notified of that meeting?

Mr. TURNER: I object to the question because the minutes themselves are the best evidence of that fact.

The COURT: The objection is sustained.

Mr. CATES: I am asking him to state from the minutes. There was a call issued for that meeting, Squire?

A. Yes sir.

Q. Have you that call?

A. Yes I think so—it was here. Yes here it is.

Q. Have you that call now?

A. Yes sir.

Q. Please read it?

42 A. The call is as follows:—

KNOXVILLE, TENNESSEE, *March* 30, 1901.

Honorable board of mayor & aldermen.

GENTLEMEN: You are hereby called to meet in special session at 7.30 o'clock this evening in the council-room to consider:

First. A proposition from the Second Presbyterian church to sell the city a portion of their lot to widen Prince street.

Second. The ordinance changing water rates.

Third. The possibility of establishing a park in connection with the Woman's building on Main aven. west.

Please attend promptly at the hour indicated and oblige

Yours respectfully S. G. HEISKELL, *Mayor*,
By J. J. ATKINS.

Q. Did Mayor Heiskell sign that call?

A. No sir, Capt. Atkins signed it.

Q. Is that the only call for that meeting of March 30th, 1901?

A. Only one that I know of.

Q. Who was notified of that meeting?

A. I can read you the endorsement of the call from here. The call is endorsed: Alderman McMillan, checked, Aiken, checked, Bell, checked, Birdsong, checked, Kephart, checked, McClellan, checked, Murphy, checked, Conner, checked, Miller, checked, and Gammon, checked.—Cleage is marked, and Reuben L. Cates, city attorney, checked. The following return is made on said call:

S. G. Heiskell, mayor:

All of the aldermen have been summoned on the within call.

Your obedient servant, J. J. ATKINS,
Chief of Police.

March 30th, 1901.

Q. What do your minutes show about summoning and notice upon Cleage?

—. Mayor Heiskell having issued a call for a meeting of the
43 board of aldermen:—In obedience thereto the following-named aldermen appeared at the council-rooms and answering roll-call:—Mayor Heiskell, presiding, to wit:—Aldermen McMillan, Aiken, Bell, Birdsong, Kephart, McClellan, Murphy, Conner, Miller and Gammon. Also present Mr. Epps, of the board of public works and several citizens.

The mayor ordered the call read, and the same is as follows:

KNOXVILLE, TENNESSEE, *March 30th*, 1901.

Honorable board of mayor & aldermen.

GENTLEMEN: You are hereby called to meet in special session at 7.30 o'clock this evening in the council-room to consider.

1st. A proposition from the Second Presbyterian church to sell the city a portion of their lot to widen Prince street.

2nd. The ordinance changing water rates.

3rd. The possibility of establishing a park in connection with the Woman's building on Maine avenue, west.

Please attend promptly at the hour indicated, and oblige

Yours respectfully, S. G. HEISKELL, *Mayor*,
By J. J. ATKINS.

The call is endorsed with the names of the aldermen, showing all summoned, except Alderman Cleage, and also showing Mr. Epps, of the board of public works, and City Attorney Cates summoned, as per return of chief of police thereon.

Q. Then the cross-mark opposite the name of Mr. Cleage would indicate that he was not summoned?

A. That is the way I took it.

Mr. TURNER: That is simply the witness's opinion as to what is meant by that cross-mark.

The COURT: I sustain the objection.

Q. That was a special or called meeting at which it is claimed that that water company ordinance was passed on its third reading?

44 A. Yes.

Q. Now then Squire, on March 9th, did you have a meeting?

A. Yes we had a meeting March 9th, 1901.

Q. I will ask you to state whether or not it is a fact that it was at that meeting of March 9th, 1901, that the ordinance in controversy here was passed on its first reading?

Mr. TURNER: I object to the question because the record will best show what was done at that time.

The COURT: I sustain the objection.

Mr. CATES: Squire Nelson, you have the minute book of the plaintiff before you, have you?

A. Yes.

Q. Now state whether or not the meeting of March 9th, 1901, was a regular or special meeting?

A. It was a called or special meeting.

Q. You had no regular meeting on that date?

A. No.

Q. Now I will ask you to state, or to read, from the minute book there of the plaintiff, any reference that may be made there as to this ordinance in controversy here?

A. It is on page 375, and is as follows:—

Alderman Birdsong stated to the board that in passing the ordinance fixing water rates, or rates to be charged consumers by the water companies in last July, the word- "per annum" had been left out (and while that word was understood) yet it was thought best to amend the ordinance, and presented and read the ordinance fixing rates to be charged consumers for the use of water per annum, and otherwise, as stated therein, by companies furnishing the same, and move- its passage on first reading.

The ordinance passed on the call of the roll, eight aldermen voting aye, and was so declared.

Q. That was this ordinance in controversy?

A. Yes sir.

Q. Now how many aldermen were notified of that meeting?

45 WITNESS: Of the meeting of March 9th, 1901?

Mr. CATES: Yes. Read the minutes or read the call.

WITNESS: "The mayor having issued a call for a meeting of the board of mayor & aldermen of the city of Knoxville,—in obedience to said call there appeared at the council rooms and answering the roll-call: Aldermen McMillan, Aiken, Bell, Birdsong, McClellan, Murphy, Conner and Gammon. The board was called to order and the message of his honor (the call was read as such) was read to the board by the recorder in the words following:

KNOXVILLE, TENN., *March* 9, 1901.

To the board of aldermen:

A meeting of the city council is called for this Saturday night, at 7.30 p. m. to consider the following matters:

First. Proposition to compromise offered by water Co.

Second. To amend or pass new ordinance regulating water rates.

Third. To consider proposition to buy Second Church strip of ground.

Fourth. To consider claim of Thomas J. Hinton.

Fifth. To rescind the action taken at the last meeting of the board memorializing the legislature to pass the bill in aid of the city hospital.

(Signed) S. G. HEISKELL, *Mayor*."

And the return of the chief of police shows that all of the aldermen above named, except those out of the city were notified. The call is endorsed with the names of all of the aldermen of the city and the city attorney, chairman of the board of public works, and

W. M. Epps, and the return of the chief of police shows that all the aldermen and above named had been duly summoned, except those out of the city. There were also present City Attorney Cates, Mr. Epps of the board of public works, A. J. Albers, and Dr. Rhea with others, representing the Second Church people, and T. J. Hinton and C. T. Cates, and others of Knoxville Water Company.

46

Q. Who was out of the city?

A. I will look at the call and see. McMillan, Aiken, Bell, Birdsong, McClellan, Murphy, Conner and Gammon were present.

Q. Isn't it a fact Squire, that the call shows that Aiken and Cleage and Trigg were all out of the city?

Mr. TURNER: I object, the call has been read.

Mr. CATES: How is the call endorsed?

A. Alderman McMillan, Aiken out of city in pencil; Bell, Birdsong, Trigg, out of city; Cleage out of city; McClellan, Murphy, Conner, Miller, Gammon, R. L. Cates, city attorney, S. N. Littleton, chairman, Wm. M. Epps, S. N. Littleton is not checked. W. M. Epps is checked.

Then there is the following return:

"Hon. S. G. Heiskell, mayor.

DEAR SIR: All the aldermen who are in the city have been summoned on the within call.

Your ob'd't serv't,

(Signed) J. J. ATKINS,
Chief of Police.

March 9th, 1901."

Q. I will ask you Squire if that paper that you have been reading from is not the original call for this special meeting of March 9th, 1901.

A. Yes sir, it is.

Q. And is it not in your possession as recorder of the city of Knoxville?

A. It is.

Q. I will ask you to state if this paper which I hand you is a correct copy of that whole paper with the endorsements on it over your seal. I will read it to you.

47

"The following is a copy of the call issued March 9, 1901 by Mayor Heiskell to the aldermen:

KNOXVILLE, TENN., *March 9th*, 1901.

To the board of aldermen:

A meeting of the city council is called for this Saturday night at 7.30 o'clock p. m. to consider the following matters:

First. Proposition to compromise offered by water Co.

Second. To amend or pass new ordinance regulating water rates.

Third. To consider proposition to buy Second Church strip of ground.

Fourth. To consider claim of Thomas J. Hinton.

Fifth. To rescind the action taken at the last meeting of the board memorializing the legislature to pass the bill in aid of the city hospital.

(Signed) S. G. HEISKELL, *Mayor.*

Conference of all aldermen at Geo. Gammon's office 2.00 p. m. today. Plaza block, opposite custom-house."

Endorsed: Aldermen McMillan, Aiken (out of city) Bell, Birdsong, Trigg (out of city) Cleage (out of city) McClellan, Murphy, Conner, Millerm Gammon, R. L. Cates, city att'y, S. N. Littleton, chairman, Wm. M. Epps.

Hon. S. G. Heiskell, mayor.

DEAR SIR: All the aldermen who are in the city have been summoned on the within call.

Your ob'd't serv't,

(Signed) J. J. ATKINS,
Chief of Police.

March 9th, 1901.

48 Enrolled 374.

STATE OF TENNESSEE, }
City of Knoxville. }

I, C. C. Nelson, recorder, and custodian of the papers and books of mayor & aldermen of the city of Knoxville, do hereby certify this paper to be a full and perfect copy of the call it purports as the same is now on file in my office.

Given under my hand and seal of said city, June 22, 1901.

(Signed) C. C. NELSON, *Recorder.*

{ Seal Mayor & Aldermen of the City of Knoxville, Tenn. Founded 1792. }

A. Yes, sir, that is a correct copy.

Q. Now Squire, on what date did this ordinance in question pass second reading?

A. On March 15th, 1901.

Q. You are the same C. C. Nelson who is the recorder of the city of Knoxville, and who tried these cases originally?

A. Yes, sir.

Q. That is the ordinance referred to in the warrant issued by you?

WITNESS: The one last passed.

Mr. CATES: Yes.

WITNESS: It was the one that had the "per annum" left out.

Q. I am talking about this ordinance shown by you to have been passed on its first reading March 9th, and second reading March

15th, and third reading on March 30th, 1901—and is the ordinance referred to in this warrant in this case issued by you?

A. Yes. I had in my mind it was the one that we corrected.

Cross-examined by Mr. TURNER:

Q. Had you full minutes of the meeting of March 9th 1901?

A. Yes, I think so.

Q. Does it deal with other subjects in addition to this
49 water ordinance?

A. Yes, sir.

Q. I will ask you to furnish a copy of these minutes in so far a they affect this ordinance—in so far as they affect this water ordinance, that is, the caption, the call and the action of the council on that ordinance.

A. I will furnish it and file it as Exhibit "A" hereto.

Q. At that time how many wards were there in the city of Knoxville?

A. Eleven.

Q. And how many aldermen?

A. Eleven.

Q. Who were the aldermen from the several wards?

A. McMillan, Aiken, Bell, Birdsong, Kephart, Cleage, McClellan, Murphy, Connor, Miller and Gammon. Trigg had resigned along about that time.

Q. Now at that meeting of March 9th, 1901, were all the aldermen present, recited in your minutes there—the call reading Aldermen McMillan, Aiken, Bell, Birdsong, McClellan, Murphy, Conner and Gammon—were all these present?

A. Yes.

Q. Aiken was present at that meeting was he not?

A. Yes.

Q. Do you know where Trigg was at that time?

A. The chief's return says he is out of the city.

Q. Do you know as a matter of fact whether he had tendered his resignation as alderman, and had removed from the city of Knoxville, to the city of Washington at that date?

A. I think his resignation was accepted later on. I have his resignation. It bears date March 15, 1901. This was March 9th you are talking about.

Q. This date of March 15th was the date of your regular meeting of the council was it?

A. Yes sir, the regular meeting of the mayor & aldermen.

Q. Do you know whether Trigg had, previous to that time, and previous to this date of March 9th, written out that resignation and deposited it with some of the city officials, and had in fact removed from Knoxville to the city of Washington?

A. My impression is——

Mr. CATES: Do not state your impression about it.

Mr. TURNER: Do you know that he did leave the city of Knoxville, and go to the city of Washington?

A. That is what I have been told.

Mr. CATES: I object—that is hearsay.

50 The COURT: I think he could testify from hearsay about residence.

Mr. CATES: I except.

Q. What was your information about his residence?

A. That he had gone to Washington city.

Q. What was the reason of his resignation as alderman—his removal from the city?

A. That is what I understood about it—I don't know really.

Q. At what time was his succes-or elected to fill his place?

A. I think it was the next meeting, March 15th.

Q. Please be sure about that Squire?

Q. Yes, it was on March 15th.

Q. Who was elected to succeed him?

A. W. H. Kephart.

Q. Now, at the time of this meeting of March 9th, do you know where Alderman Cleage was?

A. No, I could not state. He was out of the city, I should say, from the record I have of the call.

Q. Do you know in what business he was engaged at that time?

A. No sir, only I understand he has something to do with the railroad. I don't know exactly what business he is engaged in.

Q. Do you know where his headquarters were?

A. I think in North Carolina somewhere.

Q. Do you know how long he had been stationed there and engaged in that business?

A. No sir.

Q. Had it been for some time before that?

A. I think so. I know of his coming to the regular meetings, coming in on the trains, and sometimes I have heard him state that he just had time to catch the train and come to the meeting—to get from the train to the meeting.

Q. Do you know how much of the time he spent out of the city on his business?

A. I suppose the most of it.

Q. Was he at that time in the habit of attending the regular me-tings of the board of mayor and aldermen, or of absenting himself from them?

51 A. My recollection is he generally attended at the regular meetings of the board.

Q. Could you ascertain that by reference to your minutes?

A. I could tell you what meetings he did attend.

Mr. CATES: I object because it is immaterial.

The COURT: I think that might be shown.

Mr. TURNER: I will ask you about his regular attendance at the regular meetings?

A. Sometimes he was there and sometimes not. I could tell by

looking through the minutes. I have Feb'y 15th. I don't see Cleage mentioned there, and then comes March——

The COURT: We will not take time for that.

WITNESS: On March 1st he came in after the meeting commenced and was marked present.

Q. Now with regard to the meeting of March 15th 1901, you said that was a regular meeting?

A. Yes sir.

Q. This ordinance in question—this water ordinance, was passed at that meeting?

A. Yes, on second reading.

Q. This is a copy of it Squire."

A. Yes sir.

Q. You may file that Squire as Exhibit "B" hereto.

A. All right sir.

Q. Were all the aldermen present at that meeting on March 30th except Cleage?

A. There were nine marked p-esent, I believe: Alderman McMillan, Aiken, Bell, Kephart, McClellan, Murphey, Birdsong, Conner, Gamon, and Miller—ten—all were present except Alderman Cleage.

Q. Do you know where he was at -hat time?

A. My minutes of the summons on the call shows all summoned by the chief of police except Alderman Cleage.

Q. My question: Do you know where he was at that time?

A. No sir.

Q. You don't know whether he was in the city, or out of
52 the city, except from what the return shows?

A. Yes, that is all I know about it.

Q. Have you the ordinance that is referred to, the water ordinance, passed at these several meetings of the board?

A. I have it here in the minute book enrolled.

Q. I desire to ask you to put in evidence the minutes of the meeting of March 30th, 1901, in full, so far as it relates to that ordinance and the ordinance itself?

A. All right sir, and file them as Exhibit "C" hereto.

Q. I hand you this paper and ask you if this is a copy of that ordinance Squire?

Mr. CATES: I object.

WITNESS: Yes, it is a true copy of it.

Q. As passed at these several meetings?

A. Yes sir.

Mr. CATES: I object to so much of that copy as purports to be a copy of the ordinance because it has never been legally published and therefore not evidence against this defendant, and not valid until it is legally published.

The COURT: The objection *as* the introduction of the ordinance is overruled. As to whether or not it is a valid ordinance, I reserve that question.

Defendant reserved an exception.

Q. This ordinance was passed by the aldermen and was afterwards published under authority of the city?
A. Yer sir.
Q. How was it published Squire?
A. It was published in the Journal and Tribune of March 31, 1901.
Q. You have certified a copy of it,—is that the publication of it?
A. Yes sir.

Mr. CATES: I renew my objection to this ordinance for the reasons heretofore stated.
The COURT: I will sustain the objection unless Mr. Turner can show me some authorities to the contrary.
Mr. TURNER: To what extent does that go?
The COURT: You can prove the ordinance, and prove what the real facts are.

53 Re-examined by Mr. CATES:

Q. I believe you said that Mr. Cleage usually attended the regular meetings of the council?
A. Well, I said he was frequently there. My impression is that he attended more meetings than he missed.
Q. Other members of the council often missed regular meetings in addition to Cleage?
A. Yes sir.
Q. Where does Mr. Cleage reside?
A. With his mother around on Asylum street.
Q. In the 6th ward of the city of Knoxville?
A. Yes sir.
Q. The same ward from which he was elected?
A. Yes.
Q. And you don't know whether he was out of the city on Saturday night, March 30th, or not, do you?
A. No sir, I don't know anything about that.
Q. You don't know where he was on Saturday, March 9th, do you?
A. No sir, unless he was at the meeting I don't know.
Q. The records show he was not at the meeting?
A. Well, what the records show would be what I know about it.
Q. Do not the records of March 9th show he was not at the meeting?
A. Yes sir, shows he was not there.
Q. And you don't know where he was that night?
A. No sir.
Q. Do you know where Cleage was at that time?
A. No sir.
Q. Have you been asked about Mr. Trigg's resignation—you have his resignation here, have you?
A. Yes sir.
Q. Please produce it?

A. It is dated at Knoxville, March 15th, 1901.

Q. And signed by Joe M. Trigg is it not?

A. I don't know whether that is his handwriting or not. I am not acquainted with it. It looks like it.

Q. It was presented to the council and accepted on March
54 15th, you say?

A. Yes sir.

EXHIBIT "A" TO TESTIMONY OF C. C. NELSON, RECORDER.

The following is a copy taken from the minutes of the mayor and alderman meeting of the city of Knoxville, Tenn., pages 374, '5 & '6, bearing date March 9th, 1901, and appears amongst other proceedings at said meeting:

KNOXVILLE, TENNESSEE,
SATURDAY, *March 9th, A. D.* 1901.

The mayor having issued a call for a meeting of the board of mayor and alderman of the city of Knoxville—in obedience to said call there appeared at the council-rooms and answering roll-call Alderman McMillan, Aiken, Bell, Birdsong, McClellan, Murphey, Conner and Gammon.

The board was called to order, and the message of his honor (the call was read as such) was read to the board by the recorder in words following:

KNOXVILLE, TENN., *March* 9, 1901.

To the board of aldermen:

A meeting of the city council is called for this Saturday night at 7.30 o'clock p. m. to consider the following matters:

First. Proposition to compromise offered by water Co.

Second. To amend or pass new ordinance regulating water rates.

Third. To consider propositions to buy Second church strip of ground.

Fourth. To consider claim of Thomas J. Hinton.

Fifth. To rescind action taken at the last meeting of the board memorializing the legislature to pass the bill in aid of the city hospital.

The call is endorsed with all the names of the aldermen of the city, and city att'y chm. board of public works and W. M. Epps, and the return of the chi-f of police showing that all of the
55 aldermen and above named had been summoned except those out of the city.

There was also present City Att'y Cates and Mr. Epps of B. P. W., A. J. Albers, Dr. Rhea and others representing 2nd Church people and C. T. Cates and others of Knoxville Water Co. and Mr. T. J. Hinton.

"Alderman Birdsong stated to the board that in passing the ordinance fixing water rates, or rates to be charged consumers by water companies, in last July—the word per annum, had been left out, (and while that word was understood) yet it was thought best to

amend the ordinance and present and read an ordinance fixing rates to be charged consumers for the use of water per annum, and otherwise, as stated therein, by companies furnishing same and moved its passage on first reading.

The ordinance passed on call of the roll, eight aldermen voting aye, and was so declared."

STATE OF TENNESSEE, }
City of Knoxville. }

I, C. C. Nelson, recorder of the city of Knoxville, and custodian of the books and papers thereof, do hereby certify the foregoing to be a full, true and perfect copy, taken from the minutes of the mayor and aldermen of the said city, of that portion of said minutes which it purports to give as the same appears of record in said minutes at a called meeting of said board, bearing date Saturday March 9th, 1901.

Given under my hand at office in the city of Knoxville, Tennessee, August 13th, A. D. 1901.

C. C. NELSON,
Recorder & Treasurer of the City of Knoxville, Tenn.

{Seal Mayor & Aldermen of the City of Knoxville, Tenn. Founded 1792.}

EXHIBIT "B" TO TESTIMONY OF C. C. NELSON, RECORDER.

56 At a regular meeting of the mayor & aldermen of the city of Knoxville, held March 15th, A. D. 1901, amongst other proceedings of said board the following appears on record, on page 397, in words, to wit:

Water committee called. Alderman Birdsong presented and read on second reading and moved its passage (on second reading) the ordinance regulating the prices to be charged by water companies to consumers of same in city, per annum, as recited, therein, etc. The roll was called on motion to pass said ordinance on second reading, resulting, eight aldermen voting aye and was so declared by his honor.

RECORDER'S OFFICE, CITY OF KNOXVILLE,
TENN., *June* 22, *A. D.* 1901.

I, C. C. Nelson, recorder of the said city do hereby certify *that* the foregoing to be a full, true and perfect copy of the proceeding had by said board it purports to give as the same appears of record in my office.

Given under my hand at office in said city, June 22 A. D. 1901.

C. C. NELSON,
Recorder & Treas.

{Seal Mayor & Aldermen of the City of Knoxville, Tennessee. Founded 1792.}

EXHIBIT "C" TO TESTIMONY OF C. C. NELSON, RECORDER.

Copied from the minutes of the board of mayor & aldermen of Knoxville, Tennessee, bearing date March 30th, 1901, page 378.

Mayor Heiskell having issued a call for a meeting of the board of aldermen,—in obedience thereto the following-named aldermen appeared at the council-rooms and answering roll-call Mayor Heiskell, presiding, to wit: Aldermen McMillan, Aiken, Bell, Birdsong, Kephart, McClellan, Murphy, Conner, Miller and Gammon.

57 Also present Mr. Epps of the board of public works, and several citizens.

The mayor ordered the call read as message, and the same is as follows:—

KNOXVILLE, TENNESSEE, *March* 30, 1901.

Honorable board of aldermen.

GENTLEMEN: You are hereby called to meet in special session at 7.30 o'clock this evening in the council-room to consider:

First. A proposition from the Second Presbyterian church to sell the city a portion of their lot to widen Prince street.

Second. The ordinance changing water rates.

Third. The possibility of establishing a park in connection with the Woman's building on Main avenue west.

Please attend promptly at the hour indicated, and oblige

Yours respectfully, S. G. HEISKELL, *Mayor*,
By J. J. ATKINS.

The call is endorsed with the names of the aldermen showing all of them summoned except Ald. Cleage; also showing Mr. Epps of the B. P. W. and city attorney summoned, as per return of chief of police thereon.

Alderman Birdsong was allowed to present and read on its third reading the ordinance regulating the rates to be charged consumers for water as recited therein and moved as an amendment, to insert the words per annum and person, firm or corporation.

The amendments carried unanimously and the ordinance as amended passed on its third and last reading on call of the roll, ten aldermen voting aye. And the same was declared by his honor and approved by him and ordered published and said ordinance is in the following words and figures, to wit:—

An ordinance to regulate the maximum rate to be charged
58 to the consumers of water by any person, firm, or corporation in the city of Knoxville.

SEC. 1. Be it ordained by the board of mayor & aldermen of the city of Knoxville, That no person or company, firm or corporation furnishing water to the city of Knoxville or the inhabitants thereof, shall charge a higher maximum rate per annum or by meter for water than that set out in the following schedule, to wit:—

Private dwellings—per annum—occupied by one family.

4 rooms or less—per annum	$4.80
5 rooms or less—per annum	5.60
6 rooms or less—per annum	6.40
Each additional room—per annum	.50
1 bath-tub for one family	4.00
Each additional bath-tub—per annum	2.50
One water-closet of approved kind for one family per annum	4.00
Each additional water-closet, per annum	2.50
1 self-closing urinal for one family	2.50
For each additional urinal	1.50

Boarding & lodging houses—per annum.

Six rooms or less,—per annum	8.00
Each additional room—per annum	.50
One bath-tub per annum	6.50
Each additional bath-tub per annum	4.00
One water-closet,—per annum	6.50
For each additional water-closet—per annum	4.00
One closing urinal per annum	4.00
Each additional urinal per annum	2.25

Hotels.

Meter rates per annum.

Stores, offices, warehouses, & workshops.

59 For general use, not specially rated, and requiring not more than ordinary supply of water—per annum:

One faucet for one tenant	6.50
Each additional faucet, not rated below	2.25

Bakeries—per annum.

Per barrle of flour daily	4.00
No rate less than	6.50

Barber shops—per annum.

1 faucet, 1 chair	4.00
Each additional faucet	1.50
Each additional chair	1.50
No rate less than	6.50

Baths—per annum.

Public, one tub	8.00
Each additional tub	4.00

Dental offices—per annum.

1 faucet, 1 chair	6.50
Each additional chair	1.50
Each additional faucet	1.50

Druggists and apothecaries—per annum.

1 faucet	9.50
Each additional faucet	2.50

Soda fountains, meter rates.
Tumbler-washers, meter rates.
Public laundires, meter rates.

Markets—per annum.

1 faucet	$6.50 to $9.50
Each additional faucet	3.25

Printing offices—per annum.

Exclusive of water for engines or power	$6.50 to $18.00
Photograph galleries—per annum	$9.50 to $37.50
Public bar-rooms—per annum	8.00 to 18.00

60 Restaurants and dining saloons—per annum.

Without a public bar	$6.50

And 40 cents additional for each chair for table guests.

Steam boilers—per annum.

Per horse-power	2.00

Bath-tub, water-closet, and urinal for private use connected with store-, offices etc., same rate as for private dwellings, those connected with bar-rooms, restaurants, office buildings, saloons etc. same as for boarding and lodging house rates.
Stables, livery and sale stables, meter rates.

Private stables—per annum.

Each horse and cow	$1.50

Hose sprinklers and street-washers.

Rates governed by number of lineal feet frontage and include the privilege of washing windows, porches and sidewalks and sprinkling lawns.

Also street in front of the taker's premises at the following rate per annum for each portion of the year as actually used for all the above purposes:

Dwellings, with lawns, etc	$6.50
Fifty feet frontage or less, each additional 50 feet	3.00

Premises having less than 75 feet shall be rated as of 50 feet, and those having more shall be rated as of 100 feet.

Business houses, first 25 feet frontage or less	$4.50
Each additional 25 feet	2.25

Premises having less than 37½ feet shall be rated as 25 feet and those having more as 50 feet.

Fountains—per annum—use limited to 6 hours only per day for 7 months each year.

For a jet of one-sixteenth inch	5.00
For a jet of one-eighth inch	8.00
For a jet of three-sixteenths inch	12.00
For a jet of one-quarter inch	25.00
For a jet of five-sixteenth- inch	45.00

61 Or by meter at the discretion of the company or consumers.

Building purposes.

Mortar for laying brick, per thousand, .08.
Mortar for laying stone, per cu. yard .03.
Mortar for plastering, per 100 sq. yds. .28.
Mortar for other purposes, for each cask of lime or cement used .08c.
Cement sidewalks, per 100 sq. ft. .20c.

Meter rates.

0 to 50 M, gals. monthly per thousand *gl*as. .18c.
50 to 100 M gals. monthly 16c. per M gals.
100 to 150 M gals. monthly 12c. per M gals.
150 to 200 M gals. monthly 8c. per M gals.
200 to 250 M gals. monthly 7.5 per M gals.
250 to 350 M gals. monthly 6c. per M gals.
350 to 1000000 gals. monthly 5c. per M gals.
Above a million gals. monthly 5c. per 1000 gals.
Provided that the charge at any given rate shall not exceed the maximum charge at the next lower rate.
Provided that the minimum meter charge shall be less than $8.00 per annum and meter rent.
Meter rent 80c. per annum for each ¼-inch nominal size of the meter.

Elevator service.

For amount of water used as registered by the indicator, meter rates are to be charged.

Fire protection.

Automatic sprinklers or hose outlets, used exclusively for fire protection in buildings for each 1000 sq. ft. of floor space or fraction thereof, per annum $2.25

Provided, that the amount of water rent paid for other purposes on premises having fire-protection fixtures shall be abated to an amount not exceeding the charge for said fire protection, as per above.
Fire-hydrants, with outlets, like or similar to city hydrants each per annum, $45.00.

62 And no reduction or abatement on account of water used for other purposes at rate provided thereof.

SEC. 2. Be it further ordained: That it shall be good defense to any action brought against any consumer of water in the city of Knoxville, by any person, company, firm or corporation for the use of water, for such consumer to show that he has paid for the water so used by him at the foregoing rates or tendered the payment of the same, before suit was brought, with tender continuing as required by law in case of tender to date of trial.

SECTION 3. Be it further ordained: That it shall be unlawful for any person, firm company or corporation, or their officers, agents, servants or employees, supplying water to inhabitants of the city of Knoxville, to charge, demand or collect for water so supplied, more than the rates hereinbefore set forth in sec. 1 of this ordinance, and it shall also be unlawful for any such person, company, firm or corporation or their agents, officers, servants and employees to cut off or otherwise interfere with the supply or refuse to furnish a supply of water to any consumer for failure to pay for same provided such consumer tenders in lawful money the charge for such water at the rates aforesaid, and any violation of the provision of this section of this ordinance shall be a misdemeanor and upon conviction thereof before the recorder the offender shall be punishable by a fine of not less than ten ($10.00) dollars nor more than fifty ($50.00) dollars for each offense.

SECTION 4. All ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed and this ordinance shall take effect and be enforced upon and after its passage, and the welfare of the city requiring it.

STATE OF TENNESSEE, }
Recorder's Office. }

CITY OF KNOXVILLE, *June 22nd*, 1901.

I, C. C. Nelson, recorder and treas. and custodian of the
63 books and papers of the mayor & aldermen of the city of Knoxville do hereby certify the foregoing to be a full, true and perfect copy of the action of said board and ordinance passed by them, as the same appears of record in my office.

Given under my hand and seal of said city, June 22 A. D. 1901.

C. C. NELSON,
Recorder and Treasurer.

{ Seal Mayor & Aldermen of the City of Knoxville, Tennessee. Founded 1792. }

C. C. NELSON, being recalled by defendant, testified as follows:—

Examined by Mr. CATES:

Q. I call your attention to this paper which I hand to you, and ask if it is not a certified copy of the proceedings of the board of

mayor & aldermen on February 9th, 1888, certified by you, under the seal of the city?

A. Yes sir, I certified to that.

Cross-examined by Mr. TURNER:

Q. How long have you been connected with the city government?

A. I was first elected recorder on the 30th of June 1882 and have been succeeding myself.

Q. Have you been occupying the office of recorder all of that time?

A. Yes sir. Recorder and treasurer—two offices in one.

Q. Now during that time what has been the practice and custom of the city government with regard to giving notice to the Zldermen of special meetings?

A. Notice of special meetings was issued under the order of the mayor. I sometimes wrote them myself, and sometimes the mayor would write them. Sometimes I would notify all of them that I could find so that there would be quorum there for business.

64 Q. Now what was the custom with regard to members of the council who were out of the city at the time such a call as that was made.

A. We would generally report that they could not be found—were out of the city, and of course could not reach them and paid no attention to them.

Q. And no notice was given to them on such occasions.

A. No sir not that I remember of.

Mr. CATES: I object to the several questions asked the witness, and his answers thereto pertaining to what the custom was in regard to notifying or not notifying aldermen of special meetings, because the same is irrelevant and immaterial to the issues in this cause.

The COURT: The objection is well taken and sustained.

Mr. TURNER: I reserve an exception.

Re-examination:

Q. I hand you a paper certified to by you as recorder of the city of Knoxville, under the seal of said city, and ask you to tell the court what that is?

A. It is a copy of an ordinance passed May 17th, 1895.

Recross-examined:

Q. Squire Nelson I wish you would just look at that a minute and state whether that is a true copy of an ordinance passed July 27th, 1900.

A. I could not say whether that is an exact copy or not, but I expect it is.

Q. You remember of the publication of it in the Sentinel of July 28th, 1900.

A. Yes sir that is a copy of the ordinance as it was published in the Sentinel, a paper of the city, July 28th, 1900.

Said ordinance as published in the Sentinel was offered in evidence as Exhibit D to C. C. Nelson's evidence, def't by its counsel admitted the correctness of the copy but objected to the ordinance because it is immaterial and irrelevant: Objection overruled and defendant excepted.

65 Mr. CATES: I now offer:

1st. Copy of the minutes of the meeting of February 9th, 1888, of the board of mayor & aldermen of the city of Knoxville. (Here copy same filed herewith.)

2nd. The ordinance of May 17, 1895 certified copy thereof. (Here copy same filed herewith.)

3rd. The charter of the Knoxville Water Company.

(Here copy same filed herewith.)

4th. The amended charter of the Knoxville Water Company.

(Here copy same filed herewith.)

5th. The charter of the Lonsdale Beaumont Water Co.

(Here copy same filed herewith.)

6th. The contract between Knoxville Water Company and the city of Knoxville, dated July 1st, 1882. (Here copy same filed herewith.)

7th. The contract between the Lonsdale Beaumont Water Company and the town of West Knoxville, dated September 17th, 1892. (Here copy same filed herewith.)

8th. The contract between North Knoxville and Wheeler and Parks.

(Here copy same filed herewith.)

9th. Conveyance from Wheeler and Parks to the Knoxville Water Company. (Here copy same filed herewith.)

10th. The consolidated ordinance passed on October 20th 1899. (Here copy same filed herewith.)

11th. The conveyance from the Lonsdale Beaumont Water Company to the Knoxville Water Company.

(Here copy same filed herewith.)

Mr. CATES: I now offer and rely upon the following:

The Minutes of the Meeting of the Board of Mayor & Aldermen of the City of Knoxville of February 9th, 1888.

At a meeting called by his honor, Mayor Condon, held
66 Thursday February 9th, A. D. 1888. There being present, the following-named aldermen of the city of
Page 449 Min. M. Knoxville, Tennessee, to wit:—Aldermen
& A. Feb'y 9, 1888. Selby, Barry, Hockenjos, Boyd, (came in) Jones, Albers, Perry and McDaniel. Also present City Attorney J. W. Sneed, Esq. J. W. Yoe and Major Gratz, attorneys for the city in the water-works case.

Mayor Condon called the board to order and after roll-call read his message as follows:

KNOXVILLE, TENNESSEE, *February* 9, 1888.

To board of aldermen.

GENTLEMEN: You have been called together to consider a proposition of compromise and settlement made by the water works company to this board.

To consider a resolution empowering and authorizing the mayor to make arrangements relative to our finances, and appoint a committee to investigate the extension of Gay street.

And to consider the ordinance introduced by Alderman Hockenjos on 2nd reading in reference to minors.

Very respectfully,

(Signed) MARTIN J. CONDON.

City Att'y Sneed, being called read the following:

Whereas there is and has been pending between the Knoxville Water Company and the board of mayor & aldermen of the city of Knoxville, litigation over a contract made between said parties on the 1st day of July 1882.

And whereas, the Knoxville Water Company has submitted a proposition to settle all differences between the parties to said contract, which proposition is in the words and figures following, to wit:

KNOXVILLE, TEN., *Feb'y 9th*, 1888.

To the mayor and board of aldermen of Knoxville, Tenn.

GENTLEMEN: Pursuant to an interview the representatives
67 of the Knoxville Water Company have had with the mayor and the members of the board of public works, and between the Knoxville Water Company and the city, we submit the following proposition of settlement.

1. The city is to pay the Knoxville Water Company in cash all the hydrant rental due to January 1st, 1887, not heretofore paid, with interest from the dates it fell due.

2. The city will give the Knoxville Water Company an obligation for all rental of hydrants accrued since January 1st, 1887 which obligation shall be paid out of the first monies than can be made available for that purpose.

3. The Knoxville Water Company will surrender and convey to the city any supposed claim it has to the telegraph fire alarm put in by the Knoxville Water Company.

4. The Knoxville Water Company shall not be under any obligations to repair, erect, maintain or care for a telegraph fire-alarm system for the city of Knoxville, and the city shall from this date look after and bear all the expenses that may be in any way connected with the maintenance, care or repairs of any telegraph fire-alarm system it may erect. It being intended that the Knoxville Water Company shall in no way be responsible for a telegraph fire alarm of any kind, as provided in the contract between the city and the Knoxville Water Company.

5. The Knoxville Water Company upon its part agrees to pay over to the board of public works at once three thousand seven hun-

dred and fifty ($3750) dollars of the obligation to be given for the hydrant rentals falling due for the year 1887, for the purpose of assisting the city in erecting a telegraph fire alarm.

6. The hydrant rental shall go on and be paid as provided in the contract between the city and the water Co. at the rate of fifty (50) dollars per year for each hydrant up to one hundred, and the rental of each hydrant over one hundred shall be at the rate of forty-five dollars per year, payable quarterly, as provided in the original contract above referred to.

68 7. The suits now pending against the city are to be dismissed and the city will pay all the costs accrued.

Respectfully submitted

KNOXVILLE WATER COMPANY,
By R. N. HOOD, *Pr't.*

(Under seal of Knoxville Water Co.)

Endorsed: Proposition Knoxville Water Co. to Board of Mayor & Aldermen Printed: Taylor & Hood, attorneys & counsellors, Knoxville, Tennessee.

Immediately after the reading of the foregoing proposition Alderman Hockenjos offered the following:—

Therefore be it resolved by the board of mayor & aldermen of the city of Knoxville, That the said proposition is hereby accepted and the mayor & recorder and the board of public works are hereby directed to carry the same into effect.

Alderman Albers asked to hear from the board of public works.

Chm. Young stated the above was the best proposition that the Knoxville Water Co. had offered the city and he thought it the best settlement that could be made for the city.

Alderman Albers second- motion to adopt above resolution.

J. W. Yoe, Esq. and Major Gratz being present, were called and as they had acted as counsel for the city in the water-works suit against the city. After giving a history of the case decided by the supreme court of Tennessee, stated that taking everything into consideration the proposed settlement was in their opinion the best that could be made under the circumstances. In fact they had advised his *his* honor to accept a proposition of $2500 *dollars* from the water Co. for fire-alarm system, but his honor had succeeded in getting a better offer from said Co. for the city, which they thought the board could not do better than accept, at once, and get rid of the lawsuits now under way.

69 The question was called on the motion of Ald. Hockenjos to accept said proposition and pass above resolution. The roll being called, Aldermen Selby, Barry, Hockenjos, Boyd, Jones, Albers, Perry and McDaniel voting aye 8.

Mayor Condon declared the contract adopted and resolution carried.

STATE OF TENNESSEE, }
City of Knoxville. }

I, C. C. Nelson, recorder and treas. of said city and custodian of the books and papers thereto belonging do hereby certify the foregoing to be a full, true and perfect copy of the action of the mayor & aldermen of said city at the date above named which it purports to give as the same was had and now appears of record in the minutes of said board now in my office.

Given under my hand at office in the city of Knoxville, Tennessee, March 7th, A. D. 1901.

C. C. NELSON,
Recorder and Treasurer.

{Seal Mayor & Aldermen of the City of Knoxville, Tenn. Founded, 1792.}

2nd.

The Ordinance of May 17th, 1895.

At the regular meeting of the board of mayor & aldermen of the city of Knoxville, held May 17th, A. D. 1895, amongst other business the following ordinance was passed, to wit:—

An ordinance to regulate the price of water which may be supplied to private consumers within the corporate limits of Knoxville by the Knoxville Water Co., to regulate the measurement of such water, and for other purposes.

SECTION 1. Be it further ordained by the board of mayor & aldermen of the city of Knoxville, That the Knoxville Water Company be and is hereby required to furnish water to any private consumer, who shall make written application to said company for such water service by measurement through and by water meters.

SECTION 2. Be it further ordained, That any private consumer of water, who may desire such water service, shall furnish at his or her own expense a water meter of an approved type, and shall set and keep the same in good order at his or her own expense.

SECTION 3. Be it further ordained That whenever water meters may be used by private consumers of water as herein provided, such meters shall be properly set, provided with bras- unions at the inlet and outlet, and so situated that they can be conveniently read and so placed that surface water cannot get into them.

SECTION 4. Be it further ordained That the water meter of private consumers of water shall be subject to inspection and trial by the Knoxville Water Company at all reasonable and proper times. And if any such meter should be found upon inspection and trial to fail to regulate the water which passes through it said company may discontinue the supply of water — such respective meter until the same be repaired.

SECTION 5. Be it further ordained, That the following are the

maximum meter rates that it shall be lawful for the Knoxville Water Company to charge private consumers, and any greater charge, than the following shall be unlawful.

Meter rates.

0 to 50 M gals. monthly	.....	25c.	per M gallons
50 to 100 " " "	.....	20c.	" " "
100 to 150 " " "	.....	15c.	" " "
150 to 200 " " "	.....	12c.	" " "
200 to 250 " " "	.....	10c.	" " "
250 to 350 " " "	.....	09c.	" " "
350 to 1000000 *M* "	.....	07c.	" " "
Above 1,000,000 *M* gals. monthly	.....	07c.	per M gals.

Provided, that the charge at any given rate shall not exceed the maximum charge at the next lower rate.

71 SECTION 6. Be it further ordained, That all meters through which water may be supplied to private consumers, shall be read the first of each month for the water consumed during the preceding month, the bills therefor shall be payable on or before 10th of the month succeeding the month in which the water is consumed, but if such water bills shall be paid on or before the 10th of the succeeding month a discount of ten per cent. on such bills shall be allowed.

SECTION 7. Be it further ordained That a failure on the part of the Knoxville Water Company to perform any act required by this ordinance shall be deemed a misdemeanor, punishable by a fine of not less than three dollars, nor more than fifty dollars for each offense; and that the doing of any act by said company which is prohibited by this ordinance shall also be deemed a misdemeanor punishable by a fine of not less than three dollars nor more than fifty dollars for each offense.

SECTION 8. Be it further ordained That all ordinances and parts of ordinances, of the city now in force and in conflict with this ordinance be and the same are hereby repealed.

SECTION 9. Be it further ordained That this ordinance shall take effect from and after its passage, the welfare of the city requiring it.

STATE OF TENNESSEE, }
City of Knoxville, }

I, C. C. Nelson, recorder of the city aforesaid, do hereby certify the foregoing to be a full, true and perfect copy of the ordinance it purports to give as the same was passed by the mayor & aldermen of the said city, and now appearing of record in my office.

Given under my hand at office, in Knoxville, Tennessee, January 24th, 1900.

C. C. NELSON, *Recorder.*

72 { Seal Mayor & Aldermen of the City of Knoxville, Tennessee, Founded 1792. }

Endorsed: Copy. Ordinance passed at regular meeting of the board of mayor & aldermen May 17th, A. D. 1895.

3rd.

Charter of Incorporation.

The State of Tennessee to Knoxville Water Company.

STATE OF TENNESSEE.

Charter of incorporation.

Be it known, that Peter Staub, Jno. M. Brooks, F. M. Lovell, Joseph T. McTeer, Hector Coffin, Alvin Barton, H. H. Ingersoll, and associates are hereby constituted a body politic and corporate by the name and style of the Knoxville Water Company.

The general powers of said corporation are as follows:

1. To sue and be sued by the corporate name.

2. To have and use a common seal, which it may alter at pleasure, (but if it has no common seal, then the signature of the name of the corporation by any duly authorized officer, shall be legal and binding).

3. To purchase and hold or receive by gift in addition to the personal property owned by said corporation, any real estate necessary for the transaction of corporate business, and also to purchase or accept any real estate in payment or part payment of any debt due to the corporation, and sell realty for corporation purposes.

4. To establish by-laws and make all rules and regulations not inconsistent with the constitution and laws which may be deemed expedient for the management of corporate affairs, and to appoint such agents in addition to the president and secretary or treasurer as the business of the corporation may require, designate the name of the office and fix the compensation of the officers, and the term of the same not however, to exceed two years.

73 5. To make regulations concerning the subscription for and transfer of stock, fix upon the amount of capital to be invested in the corporate business, the division of the same into shares, the time required for the payment thereof by the subscribers for stock, and the amount to be called for at any one time *an* the non-payment of which after notice a right of action shall accrue to the corporation against the stockholder in default.

The first board of directors shall be the corporators applying for and obtaining the charter, and thereafter the board shall consist of five or more members at the option of the corporation to be elected by a majority of the votes cast by the stockholders, either in person or by proxy, each share representing on- vote, a majority of the board of directors shall constitute a quorum and shall fill all vacancies till the next election. The board of directors shall keep a full and true record of all their proceedings and an an-ual statement of receipts and disbursements shall be copied on the minutes which shall be subject at all times to the inspection of any stockholder, and the books of the corporation shall show the *ro*-ginal and subsequent stockholders, their respective interests, the amount which has been paid *an* the shares subscribed, the transfer of stock by and to whom made, and such other transactions as the stockholders or creditors

may be presumed to have an interest to know. The amount of unpaid stock due from a subscriber to the corporation shall be a fund for the paymant of any debts due from the corporation and the transfer of stock by a subscriber shall not relieve him from liability on his subscription till the full amount thereof has been paid. The corporation shall have the right and power to borrow money and issue notes or bonds upon the faith of the corporate property, and also to execute a mortgage or mortgages as further security for repayment of money thus borrowed. The business of said company shall be to establish and construct water works in or near the city of Knoxville, Tennessee, and it shall be the duty of said company to build, furnish and equip water
74 works of sufficient capacity to furnish the corporate authorities and inhabitants of said city with water. To enable the company to establish such works it is hereby authorized and empowered to lay down pipes through the streets, lanes and alleys of said city, in such manner, however, as to produce, the least possible inconvenience to the city, or its inhabitants, or to travellers, and to take up pavements and sidewalks provided they shall repair the same with the least possible delay. The company shall have powers and are hereby authorized to bring into said city a sufficient supply of water by means of pipes or tanks, or in any other way, and to construct reservoirs for the reception thereof, and to supply with water the inhabitants of said city and the environs thereof, and all who may be along the line of the company pipes, and of erecting hydrants or fire-plugs within said city and to contract with said inhabitants and with the corporate authorities of said city, or any incorporated companies for the use of said water, and charge such prices for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations respecting the use and waste of said water as the directors of the company may from time to time prescribe.

The works and operations of said company shall be so constructed and managed that no annoyance shall accrue therefrom to the health and comfort of the inhabitants of the city and nothing in this charter shall be so construed as to absolve the company, its officers or agents, from any legal proceedings to restrain or abate any nuisance arising from such water works, or operations.

If any person or persons shall injure or destroy any portion of the water pipes or other property of said company, or shall wilfully open a communication into the street or into other water pipes or let on water after it has been stopped by the company, such person or persons shall be liable for all damages sustained by such proceedings, and also to penalty not exceeding five hundred dollars, upon
75 conviction before a competent court having jurisdiction of the offense. If any person or persons shall take or use any water of said company for domestic or other purposes without having previously contracted for the same with the officers of said company such person or persons shall forfeit and pay to the said company the sum of fifty dollars to be recovered before any justice of the peace in the same manner as other debts are collected by law.

Provided that nothing herein contained shall be construed to

compel the inhabitants of said city to use the water so introduced by said company, or to prevent them from using water obtained in any other way. And if any person or persons shall wilfully, corrupt or permit anything to run into or fall into any stream or reservoir from which the company shall take water to be introduced into said city which shall corrupt the same or render it unpalatable, unwholesome or unfit for domestic or *am*nufacturing use or for the supplying of stationary or locomotive engines, o*t* shall bathe in any dam or reservoir, lead or enter any animal into the same, he shall on conviction thereof before any justice of the peace of the civil district in which said water is situated pay a fine of not less than ten nor more than fifty dollars, one-half for the use of the informer, and the other half to the use of said company, and shall moreover remain liable to said company for all damages.

A failure to elect officers at the prope*r*ty time shall not dissolve the corporation, but those in office shall hold until the election or appointment and qualification of their successors. By no implication or construction shall the corporation be deemed to possess any powers except those hereby expressly given or necessarily implied from the nature of the business for which the charter is granted, and by no interference whatever shall said corporation possess the power to discount notes, or bills, deal in gold or silver coin, issue any evidence of debts as currency, buy and sell any agricult-
76 ural products, deal in merchandise, or engage in any business outside the purpose of the charter.

The right is reserved to repeal, annul or modify this charter. If it is repealed, or if the amendments proposed being not merely auxiliary but fundamental, are rejected by a vote representing more than half the stock the corporation shall continue to exist for the purpose of winding up its affairs, but not to enter upon any new business. If the amendments or modifications being fundamental are accepted by the corporation as aforesaid, in any general meeting to be called for that purpose, any minor, married woman or other person under disability or any stockholder not agreeing to the acceptance of the modification shall cease to be a stockholder and the corporation shall be liable to pay to said withdrawing stockholders the par value of their stock, if it is worth so much, if not, then so much, as may be its real value in the market on the day of the withdrawal of said stockholder, as aforesaid, provided, that the claims of all creditors are to be paid in preference to said withdrawing stockholders.

We, the undersigned, apply to the State of Tennessee, by virtue of the laws of the land, for a charter of incorporation for the purposes and with the powers declared in the foregoing instrument.

Witness our hands the 27th day of December, 1881.

PETER STAUB.
JNO. M. BROOKS.
F. M. LOWELL.
JOS. T. McTEER.
HECTOR COFFIN.
ALVIN BARTIN.
H. H. INGERSOLL.

STATE OF TENNESSEE, }
City of Knoxville. }

I hereby certify that leave to operate under the foregoing charter of incorporation has been duly obtained from the corporate authorities of said city. Witness my hand and seal of office, this — day of ——, 188–.

—— ——.

77 STATE OF TENNESSEE, }
Knox County. }

Personally appeared before me J. F. J. Lewis, clerk of the county court of said county, Peter Staub, Jno. M. Brooks, F. M. Lowell, Jos. T. McTeer, Hector Coffin, Alvin Barton, and H. H. Ingersell, the within-named bargainors, with whom I am personally acquainted and who acknowledged that they executed the within instrument for the purposes therein contained.

Witness my hand and official seal at office, in Knoxville, Tennessee, this 27th day of December 1881.

J. F. J. LEWIS, *Clerk.*

[Seal of the County Court of Knox County, Tennessee.]

Rec'd for record, Dec'r 27″ 1881, at 11 o'clock a. m. Recorded Dec. 28th, 1881.

JNO. J. MARTIN, *Dep. Reg.*

I, David A. Munn, secretary of the State of Tennessee, do certify that the foregoing instrument, with certificate of acknowledgement of probate and registration, was filed in my office for registration on the 4″ day of Jan'y 1882, and recorded on the 4″ day of Jan'y, 1882 in Corporation Record Book, G in said office, page 34.

In testimony whereof, I have hereunto subscribed my official signature, and by order of the governor affixed the great seal of the State of Tennessee, at the department in the city of Nashville, this the 4″ day of Jan'y A. D., 1882.

D. A. MUNN,
Secretary of State.

{ The Great Seal of the State of Tennessee, XVI— }
{ Agriculture, Commerce. }

REGISTER'S OFFICE, KNOX CO., TENN.

I, M. A. M. Armstrong, register of said county do certify
78 that the foregoing is a full, true and perfect copy of the charter from State of Tenn. to Knoxville Water Co. as the same appears of record in this office in Book 3 V page 495, *et seq.*

Witness my hand at office in Knoxville, this 15″ day of July, 1897.

M. A. M. ARMSTRONG, *Register.*
By JNO. L. FAULKNER, *D. Reg.*

Endorsed: Cert. copy of charter of the Knoxville Water Co. Register fee, $3.15.

4.

Amendment to the Charter of Incorporation.

State of Tennessee to Knoxville Water Company.

STATE OF TENNESSEE:

Amendment to the charter of incorporation of the Knoxville Water Company.

Be it known that on the 4th day of January, 1882, a charter of incorporation was granted by the State of Tennessee, constituting certain persons therein named a body politic and corporate by the name and style of the "Knoxville Water Company" with the powers, privileges, conditions and restrictions therein stated, (which charter of incorporation was registered in Book "V" vol. 3 pages 495–498 in the register's office for Knox county, Tennessee, and in Corporation Record, Book 6 page 34, in the office of the secretary of State of Tennessee) and under and by virtue of said charter the said Knoxville Water Company was afterwards duly organized and a president and secretary and board of directors elected; and at a meeting of the directors and stockholders of the said Knoxville Water Company held July 25th 1882, at which all officers and stockholders were present it was unanimously resolved that an amendment be sought to said charter of incorporation of the tenor hereinafter stated.

Now, therefore, we the undersigned, comprising the directors and stockholders of the Knoxville Water Company, apply to the
79 State of Tennessee by *the* virtue of the general laws of the land for an amendment to said charter of incorporation for the purpose of imposing the following restrictions and limitation upon the exercise of the powers thereby conferred, to wit:

XVII. This corporation is prohibited from issuing bonds in excess of the sum of one hundred and twenty-five thousand dollars (par value) for the period of five years next following July 1st, 1882, and after that time in excess of twenty-five thousand dollars additional, and the indebtedness of said corporation by bond shall not at any time exceed the sum of one hundred and fifty thousand dollars. All bonds issued in violation of this provision as to said corporation shall be utterly null and void—shall not be obligatory upon said corporation as a debt, nor in any way constitute a charge upon its property, real or personal, but shall be only the personal and individual liabilities and obligations of the officers and stockholders actually participating in such wrongful issuance of the same, provided that nothing herein contained be construed or understood as in any way prohibiting or restraining said corporation from altering enlarging or adding to its capital stock already subscribed.

Witness our hands the 25" day of July, 1882.

S. E. COOKE.
F. M. LOWELL.
ALVIN BARTON.
PETER STAUB.
SAM. McKINNEY.

I, C. C. Nelson, recorder of the city of Knoxville, certify that at the board of mayor & aldermen of the city of Knoxville, have by a resolution of said board approved the foregoing amendment to the charter of incorporation of the Knoxville Water Company and have granted leave to operate thereunder to said company.

Witness my hand and seal of office this July 25, 1882.

C. C. NELSON,
Recorder, &c.

80

[City of Knoxville. Founded 1792.]

STATE OF TENNESSEE, }
Knox County. }

Personally appeared before me, J. F. J. Lewis, clerk of the county court of Knox county, S. E. Cooke, S. M. Lowell, Peter Staub, Alvin Barton and Sam. McKinney, the within-named bargainors, with each of whom I am personally acquainted and who acknowledged that they executed the foregoing instrument for the purposes therein contained, and thus certified for registration accordingly.

Witness my hand and seal of office, at Knoxville, Tennessee, this July 25th, 1882.

J. F. J. LEWIS, *Clerk.*

[Seal of the County Court of Knox County, Tennessee.]

Rec'v'd for record 25″ day of July, 1882, at 4½ p. m. and recorded same day.

JNO. J. MARTIN, *Dep. R.*

I, David A. Munn, secretary of *the* state of the State of Tennessee, do certify that the foregoing instrument, with certificate of acknowledgement of probate and registration, was filed in my office for registration on the 27th day of July, 1882, and recorded on the 27 day of July, 1882 in Corporation Record Book "G" in said office, page 337.

In testimony whereof, I have hereunto subscribed my official signature, and by order of the governor affixed the great seal of the State of Tennessee, at the department in the city of Nashville, this 27th day of July, A. D. 1882.

D. A. MUNN,
Secretary of State.

81 { The Great Seal of the State of Tennessee, }
{ XVI. Agriculture-Commerce. 1796. }

Received July the 29th, 1882 at 10 o'clock a. m. Recorded the same day rec'd.

JNO. J. MARTIN,
Dept. Register.

REGISTER'S OFFICE, KNOX COUNTY, TENN.

I, R. M. Johnson, register of said county, do certify that the foregoing is a full, true and perfect copy of the am. charter from State of Tennessee, to Knoxville Water Company, as the same appears of record in this office in Book V. 3 page 570.

Witness my hand at office in Knoxville, this 7th day of March 1901.

R. M. JOHNSON, *Register.*

(10 cents.—10. United States internal revenue Series of 1898, documentary R. M. J. 3/7/1901.)

5.

Charter of the Lonsdale-Beaumont Water Company.

STATE OF TENNESSEE:

Charter of incorporation.

Be it known, that D. S. McIntire, H. E. Holmes, Daniel Kelly, William M. Baxter, and H. P. Coile, (all of whom are more than twenty-one years of age) are hereby constituted a body politic and corporate by the name and style of "the Lonsadle-Beaumont Water Company" for the purpose of establishing and constructing water works adjacent to and in the town of West Knoxville, in
82 Knox county, Tennessee, and it shall be the duty of said company to build water works and provide machinery in or adjacent said town, and of sufficient capacity to supply said town and the inhabitants thereof with a plentiful supply of water and for this purpose said company is hereby authorized and empowered and invested with the privilege to lay down pipes and to extend acqueducts and conductors through any or all of the streets, lanes or alleys of said town, and to supply the inhabitants of said town with water by public works, and for the purpose of laying down such pipes, acquedeucts and conductors, said company may take up the pavements or sidewalks, upon such streets after permission has first been obtained from the corporate authorities of said town, provided, that said pavements and sidewalks shall be taken up in such manner as to give the least inconvenience to the inhabitants of said town, and that the same shall be replaced with all convenient speed by and at the expense of said company in as substantial manner as found before taking up.

The works and operations of said company shall be so constructed and managed as not to effect the health and comfort of said town prejudicially; and nothing in the charter shall be so construed as to absolve said company from legal proceedings to restrain or abate any nuisance arising from its operations.

If any person shall injure or destroy any portion of the fixtures of other works or property belonging to said company, or shall wilfully open any communication into the streets or other water pipes or let on water after it has been stopped by the company, such person or persons shall be liable for all damages sustained by such proceedings, and also a penalty not exceeding five hundred ($500.00) dollars, upon conviction before a court having jurisdiction of the offense.

If any person or persons shall take or use any of the water of said company for domestic or other purposes without having previously

contracted for the same with the officers of said company, such
83 person or persons shall forfeit and pay to said company the sum of fifty dollars ($50.00) to be recovered before any justice of the peace in the same manner as other debts are collected by law; provided, that nothing herein contained shall be construed to compel the inhabitants of said town to use the water so introduced by said company or prevent them from using water obtained in any other way.

If any person or persons shall wilfully corrupt or commit anything to run into or fall into any streams or reservoir from which the said company shall take water to be introduced into said cities or village which shall corrupt the same or render it unpalatable, unwholesome or unfit for domestic or manufacturing purposes or use or for the supplying of stationary or locomotive engines, or shall bathe in any dam or reservoir, lead or enter any animal into the same, on being convicted thereof before any justice of the peace of the civil district in which the said water is situated, — shall pay a fine of not less than ten $10.00 dollars nor more than fifty ($50.00) dollars, one-half to the use of the informer, the other half to the use of said company, and shall moreover, remain liable to said company for all damages.

Said company is hereby empowered and authorized to condemn and take such land as may be necessary for the establishment of their reservoir and works, and the rights of way through all lands between its reservoirs and the said town to lay its pipes, acquedeucts or conductors, and keep the same in repair, is hereby granted said company, provided that such pipes and conductors shall be laid in such manner as to do as little injury to the property of private persons as possible. And provided further that said company shall make compensation to the owners of the real estate condemned or taken, or through which the pipes, conductors or acqueducts may be laid. If the owner and said company cannot agree upon the amount of compensation which shall be paid, the same shall be assessed in the manner provided by the Code of Tennessee, (1858, section 1325 to 1348 inclusive).

Said company is hereby vested with all the powers and privileges and shall be governed by all the restrictions incorporated
84 in section 5 of the acts approved March 23rd, 1895, to wit:

The general powers of said corporation are:—

1. To sue and be sued by the corporate name.

2. To have and use a common seal, which it may alter at pleasure, if no common seal, then the signing of the name of the corporation by any duly authorized officer shall be legal and binding.

3. To purchase and hold by gift in addition to the personal property owned by said corporation any real estate necessary for the transaction of the corporate business; and also to purchase or accept any real estate in payment or part payment of any debt due to the corporation, and sell realty for corporate purposes.

4. To establish by-laws, and make all rules and regulations not inconsistent with the laws and the constitution deemed expedient for the management of corporate affairs.

5. To appoint such subordinate officers and agents in addition to president, secretary or treasurer, as the business of the corporation may require.

6. To designate the name of the office and fix the compensation of the officers.

7. To borrow money, and issue notes or bonds upon the faith of the corporate property and also to execute a mortgage or mortgages as further security for the payment of money thus borrowed.

The following provisions and *instructions* are coupled with said grant of powers.

1. A failure to elect officers at the proper time does not dissolve the corporation, but those in office hold until the election, appointment and qualification of their successors.

2. The terms of all officers may be fixed by the by-laws of the corporation, the same not, however, to exceed two years.

3. The corporation may, by the by-laws, make regulations concerning the subscription of or transfer of stock; fix upon the amount of capital to be invested in the enterprise; the division of the same into shares; the time required for the payment thereof by the
85 subscribers for stock; the amount to be called at any one time, and in case of failure of any stockholder to pay the amount thus subscribed by him at the time and in the amount thus called, a right of action shall exist in the corporation to sue said defaulting stockholder for the same.

4. The board of directors which may consist of five or more members, at option of the corporation, to be elected either in person or by proxy by a majority of the votes cast, each representing one vote/ shall ke-p a full and true record of all their proceedings and an annual statement of receipts and disbursements shall be copied on the minutes subject at all times to the inspection of any stockholders.

5. The books of the corporation shall show the original or subsequent stockholders, their respective interests, the amount which has been paid on the shares subscribed, the transfer of stock, by and to whom made; also other transactions — which it is presumed a stockholder or creditor may have an interest.

6. The amount of any unpaid stock due from a subscriber to the corporation, shall be a fund for the payment of any debts due from the corporation, nor shall the transfer of stock by any subscriber relieve him from payment unless his transferee has paid up all or any of the balance due on original subscription.

7. By no implication or construction shall the corporation be deemed to possess any powers except those hereby expressly given or necessarily implied from the nature of the business, for which the charter is granted, and by no inference whatever, shall said corporation possess the power to discount notes, bills deal in gold or silver coin, issue any evidence of debts as currency, bur or sell any agricultural products, deal in merchandise or engage in any business outside the purpose of the charter.

8. The right is reserved to repeal, annul or modify this charter. If it is repealed or if the amendments proposed being not merely

auxiliary but fundamental, are rejected by a vote representing more than half of the stock, the corporation shall continue to exist for the purpose of winding up its affairs, but not to enter upon any new business.

86 If the amendments or modifications being fundamental, are accepted by the corporation, as aforesaid, in a general meeting called for that purpose, any minor, married woman, or person under disability, or any stockholder not agreeing to the acceptance of the modification shall cease to be a stockholder and the corporation shall be liable to pay said withdrawing stockholders the par value of their stock if it is worth so much; if not, then so much as may be its real value in the market on the day of the withdrawal of said stockholders as aforesaid, provided, the claims of all creditors are to be paid in preference to said withdrawing stockholders.

9. A majority of the board of directors shall constitute a quorum, and shall fill all vacancies until the next election. The first board of dierectors shall consist of the five or more corporators, who shall apply for and obtain the charter.

10. The said corporation may have the right to borrow money monthly and issue notes and bonds upon the faith of the corporate property, and also to execute a mortgage or mortgages for the further security for the payment of money thus borrowed.

We, the undersigned, apply to the State of Tennessee, by virtue of the laws of the land for the foregoing charter of incorporation, under the acts of March 23rd, 1875, and its various amendments.

Witness our hands this 1st day of July, 1891.

1. D. S. McINTYRE.
2. H. E. HOLMES.
3. DANIEL KELLY.
4. WM. M. BAXTER.
5. H. P. COILE.

Witness:
E. C. GOTHARD.

STATE OF TENNESSEE, }
Knox County. }

Personally appeared before me, W. T. Jones, deputy clerk of the county court of Knox county, aforesaid, E. C. Gothard, the

87 subscribing witness to the annexed charter, who, being first sworn, deposed and says that he is acquainted with D. S. McIntyre, E. E. Holmes, Daniel Kelly, Wm. E. Baxter, and H. P. Coile, the corporators and that they acknowledged the same in his presence to be their act and deed on the day it bears date.

Witness my hand at office in Knoxville, the 20th day of July 1891.

W. T. JONES,
Deputy Clerk.

[Seal of the Co. Court Knox Co. Tennessee.]

Be it known, that by virtue of the resolutions of the corporate authorities of West Knoxville, leave has been had and obtained authorizing the foregoing proposed water company to operate its proposed water works with a the corporate limits of West Knoxville, and that as directed and empowered by said resolution, I, John W. Yoe, mayor of said town of West Knoxville, do hereby so certify, and for said town assent to the foregoing application for the charter herein applied for by D. S. McIntyre and others.

This 1st day of July, 1891.

JOHN W. YOE,
Mayor of West Knoxville.

Received for record, the 21st day of July, 1891, at 10 o'clock a. m., recorded, July 22nd, 1891.

M. A. M. ARMSTRONG, *Register.*

I, Chas. A. Miller, secretary of the State of Tennessee, do certify that the foregoing instruments with certificates of acknowledgement of probate and registration was filed in my office for registration on the 28th day of July, 1891, and recorded on the 28th day of July 1891, in Corporation Record Book P P in said office, p-ge 151.

(Here the Great Seal of the State of Tennessee.)

In testimony whereof I have hereunto subscribed my official signature and by order of the governor affixed the great seal of the State of Tennessee, at the department in the city of Nashville, this 28th day of July, A. D., 1891.

88

C. A. MILLER,
Secretary of State.

This certificate together with the great seal of the State of Tennessee, was received the 29th day of July, 1891, at 9 o'clock a. m. and recorded same day.

M. A. M. ARMSTRONG, *Register.*

REGISTER'S OFFICE, KNOX CO., TENN.

I, R. M. Johnson, register of said county, do certify that the foregoing is a full, true and perfect copy of the charter from State of Tennessee, to Lonsdale Beaumont Water Co. as the same appears of record in this office, in Book 110 at page 343.

Witness my hand at office in Knoxville, this 6 day of March, 1901.

R. M. JOHNSON, *Register.*

(10—ten cents—10 United States internal revenue series of 1898, documentary R. M. J. M'ch 6, 1901.)

Endorsed: Charter Lonsdale Beaumont Water Co.

Mr. CATES: I also offer the contract between the Knoxville Water Company, and the city of Knoxville, dated July 1st, 1882 which is copied in the record as Exhibit "A" to defendant's second plea, at page 8

7th.

The contract between the Lonsdale Beaumont Water Company and the town of West Knoxville, dated September 17th, 1892, which is as follows:

At a meeting of the town council of West Knoxville, held at the city hall, September 17th, 1892, amongst other proceedings,
89 the following ordinance was passed, and became a law, in words, to wit:—(See Record Book, page 193 to 208, inclusive.)

An ordinance to provide for a supply of water to West Knoxville, county of Knox, State of Tennessee, and to its inhabitants, and contracting with Lonsdale Beaumont Water Co. for a supply of water for public and private use.

Be it ordained by the town council of West Knoxville.

SECTION I. That in consideration of the public and private benefits to be derived therefrom, the right and privilege is hereby granted for the period of twenty (20) years from the time this ordinance takes effect, unto Lonsdale-Beaumont Water Company, (hereinafter called grantees) of erecting, maintain-g and operating a system of water works in accordance with the terms and provisions of this ordinance, and using the streets, alleys, ways, public squares and all other public places within the corporate limits of said West Knoxville, as they now exist or may hereafter be extended (and within such other territory as may now or hereafter come under its jurisdiction by addition or otherwise) for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnish- an adequate supply of good wholesome water in said West Knoxville, and to its inhabitants, for public and private use, and for making extensions, additions and repairs to said system, from time to time, during the period for which this ordinance shall continue or be in force.

SEC. II. The said grantees shall exercise all reasonable care and diligence in the use of the said streets, alleys, ways and public places, and shall cause no unnecessary obstructions of or interruption to the public travel over and upon the same, ir any unnecessary injury to or interference with any pipes. or sewers, which may be now, or hereafter lawfully located beneath the surface thereof, and said grantees shall also take every reasonable precaution
90 to provide against danger to life and limb by reason of the exercise of the rights and privileges hereby granted, and shall cause all excavations and obstructions to be properly lighted and guarded at night, and after the completion of the purposes for which said streets, alleys, ways, public squares and other public places may be used, they shall be carefully tamped and restored to their former condition, as near as may be, without unnecessary delay, and said grantees hereby agree to hold said West Knoxville harmless from any liability which may result to it, by reason of any violation of this section.

SEC. III. The general plan of this system of water works shall be as follows, viz:—

Rates.

The pipe system shall consist of not less than five and one-quarter (5¼) miles of pipe, to be of sizes, varying from four (4) to twelve (12) inches interior diameter, and to be laid on such streets, alleys, avenues, ways and public places, as may be designated by the council, after inspection of the plan of pipe line to be hereafter submitted to said town council by said grantees; said council to have the right to confer with a competent civil engineer—and upon which said city may wish to locate hydrants, said pipes to be so located as to form complete circuits in said system, provided, that not more than two hydrants shall be located on a continuous line of four-inch pipe, unless the pipe has more than one connection with the larger-sized pipe; provided, further, however, that said grantees shall have the right to locate and lay their pipes upon any street, avenue, alleys, ways and public places, as they may desire in order to furnish private consumers with water. Provided, further, that grantees shall observe all precautions and be governed by *sand* liabilities in laying such as others, under direction of the council.

All pipes laid to be of standard or heavy weight, and tested at their place of manufacture to withstand a pressure of (300) three hundred pounds per square inch, and to be coated with Dr. Angus Smith's preservative varnish.

91 The city shall have the right upon the mains hereinbefore provided for, to order the erection of any intermediate fire-hydrants, the same to be free of charge for water during the time of rental for the hydrants, to be inserted by said grantees at the expense of said city, at the actual cost of such hydrants.

Hydrants.

The hydrants shall be frost proof, double nozzle, of approved pattern, with hose tips fitted to connect with such hose couplings as the town council may adopt.

Valves.

Valves shall be located at such points as will admit of not over three blocks being isolated from balance of system in case of needed repairs or extensions; they shall be of the most approved pattern, and be capable of withstanding the pressure of three hundred pounds (300) per square inch on either surface, and be furnished with box cover.

Pumping plant.

The pumping plant including reservoir or stand-pipe, from which the mains are to be supplied, shall be of modern approved type and plan, and be capable of throwing five (5) streams through fifty (50) feet of hose and inch ring nozzles simultaneously from five (5) separate hydrants, and under such pressure as will throw streams of water fifty feet (50) high*t* on Fort Sanders, (so called) said five hydrants to be so chosen *so* as to give a just average, two by West Knoxville, two by said grantees, and the fifth by a disinterested party chosen by town council and grantees jointly.

Source of supply.

The source of supply shall be from Tillery springs, from wells and springs adjacent thereto at or near Sharp's gap, or from springs or wells at or adjacent to Fountain City, or from springs, lakes or wells, on or adjacent to property formerly owned by Middlebrook Park Association, or from one or more of said places and in all cases such supply shall be ample for the needs of the corporation
92 and its citizens and inhabitants, and *and* be free from sewerage or other contamination and shall be clear, good and wholesome water, suitable for domestic and manufacturing purposes.

All springs and wells used for said supply, shall be protected from surface-water contamination by suitable stone or brick masonry walls; and from matter falling or being thrown into them by screen or other suitable screens being placed and fixed over or above them.

SEC. *17.* In consideration of the public benefit and the protection to property resulting from the construction of said system of water works, the said West Knoxville hereby rent of said grantees fifty (50) double-nozzle fire-hydrants, to be placed at such points on the mains as may be selected by said town council, for the aforesaid period of twenty (20) years, at an annual rental of $40.00 per hydrant, said fifty (50) and all additions thereto, shall bear an annual rental of $40. forty dollars per hydrant, during the remainder of said period of twenty (20) years. All of which annual rent of said hydrant shall be paid semi-annually on the first day of January and July of each and every year. All hydrants placed upon extensions of mains in excess of five and one-quarter (5¼) miles hereinbefore mentioned, shall be placed at the rate of nine per mile of pipe on such extensions.

Water shall be used from such hydrants only for the extinguishment of fires and necessary fire practice, and for the flushing of public sewers and gutters, provided that for said flushing of sewers and gutters not more than one hydrant shall be opened at any one time, and only for a period not to exceed six hours (6) per week, during the first five years; eight hours per week during the second five years, and ten hours per week for the remainder of said term of twenty years.

Said city shall have the right to flush sewers by hose attached to hydrants on mains, or to tap said mains and insert service mains to connect with the flush tanks of its sewerage system, provided
93 that in so doing, no greater amount of water shall be used than hereinbefore provided for flushing purposes.

SECTION V. Water shall be furnished to the corporation schools and public buildings used for town purposes and two drinking fountains for man and beast and one ornamental fountain to be erected at such point on the lines of mains as the town council may direct; if council should erect ornamental fountain at any point not on mains, as located, then sufficient piping shall be laid from main to point where fountain is located, sufficient to supply same with

water, the same in all pipes, fixtures and connections therefor to be furnished and provided by the town, and no water shall be taken from said fountain for private use; and the remuneration to be paid by the town for said service of water shall be equal during the first five years of the operation of the works to such an amount as may from time to time be levied by town council against said water-work- plant for municipal taxation, said amount to be due and payable annually.

And for the remainder of the term that the franchise and contract is to run, said grantees are to be liable for and pay taxes and shall furnish water as provided in this section free of cost for purposes named in this section. In case additional drinking or ornamental fountains are ordered by said city, water shall be furnished for the same at the lowest meter rates. Said grantees shall furnish water free of cost to each of the churches of said city, the same passing through self-closing fixtures, the expense of which together with all pipes and connections and the work of inserting the same to be borne by each of said churches respectively.

SEC. VI. Upon the completion of the construction of the said system of water works, the grantees shall notify the town council of the fact and thereupon an official test shall be made to show the capacity of the works, and if upon such test it shall be shown that said water works comply with the requirements as contained in section 3 of this ordinance, then and in that case the said council shall by ordinance or resolution formally accept such system, and
94 thereupon the rental for the hydrants hereinbefore mentioned shall begin.

SECTION VII. Be it further ordained That within ten days after this ordinance takes effect, said grantees shall file their written acceptance of the ordinance in the office of the recorder, and thereupon the same shall be and become the contract between the said town of West Knoxville and said grantees, as fully as if the provisions of this ordinance were embodied in a formal written contract, made and executed between said grantees and West Knoxville, and said grantees shall also within ten days file with the recorder a good and solvent bond in the sum of one ($1,000) thousand dollars with good local security, conditioned that if said grantees fail to commence work within the time fixed and prosecute same vigorously (with the exceptions hereinafter named) or shall fail to build the works as agreed, that grantees shall and will pay West Knoxville one thousand ($1000) dollars as liquidated damages for failure in either of the contingencies herein named, and agreeing and providing that the measure of damages for failure to begin work and prosecute same vigorously or to build the works as agreed, shall be one ($1000) thousand dollars, and that amount shall be paid as liquidated damages, said bond to be approved by the mayor before it is accepted by the recorder.

If works are built and accepted after test, then said bond shall be cancelled, and surrendered. If said bond is not approved by the mayor, the council, may if it so elect, to declare the contract at an end and forfeited.

The construction of said system of water works shall be commenced within thirty (30) days after this ordinance takes effect and be completed by February 1st, 1893, provided however, that the time during which work is delayed by the act of God, the public enemy, or strikers, shall form no part of said time, but it is expressly provided, that said work shall be completed within eight months from the time this ordinance takes effect in any contingency and without excuse, let, hindrance, or cause of any kind.

95 SEC. VIII. The said town council shall from time to time enact and enforce ordinances inflicting suitable penalties for the protection of said water works, and all property and things therewith connected, as well as the business thereof from damage, fraud or imposition.

SEC. IX. The said grantees shall make extension of their line of mains whenever called upon to do so, in any proper season of the year, by said West Knoxville, provided, however, that said extension shall not be less than five hundred and eighty-seven (587) feet in length, and that one public fire-hydrant shall be located on each five hundred and eighty-seven (587) feet, or major part thereof.

SEC. X. After the works are put in operation, West Knoxville, may from time to time, have tests made upon the same terms of test required for acceptance of works, and if at any time, the said grantees should fail to produce and maintain the pressure in the mains as hereinbefore provided the same shall be brought up without delay, unavoidable hindrances excepted, and if unreasonable delay, then the rental for the use of the hydrants shall cease until the standard pressure is obtained, provided, however, that if such failure shall continue for four (4) consecutive calendar months, or if grantees or assigns fail to furnish an ample supply of water as agreed, then all the rights under this ordinance shall at the election of West Knoxville cease and determine but nothing herein contained shall be so construed as to prevent grantees from temporarily cutting off the water from said system or any portion thereof, for the purpose of making the repairs or extensions to the same, and no liability shall attach to said grantees for the suspension of the supply of water provided the repairs or extensions are made and the water turned on again without unnecessary delay.

It is further provided that if the grantees or their successors, fail to supply water for the town or citizens, then no rental shall be paid by either town or citizens during such failure.

96 SEC. XI. The said grantees shall not charge consumers during the continuance of the franchise granted by this ordinance exceeding the following maximum annual rates, these rates, however, to be subject to ten per cent. discount on all bills made, except those where water is metered or used for fire-protection, mechanical or manufacturing purposes, if settled within ten days of their date.

The following *or* the said annual rates, viz:—

Banks with self-closing faucet	$6.00
Banks, with hose connection extra	8.00
Bakeries, daily average each bbl. of flour used, per barrel	4.00
Barber shop, first chair and basin	5.00
Barber shop, each additional chair	2.00
Baths, private without heating attachments	3.00
Baths, private with heating attachments	4.00
Baths public, first tub	10.00
Baths, each additional tub.	6.00
Building purposes, brick per M laid	.08
Building purposes, stone per cu. yard	.04
Building purposes, plastering per 100 yards	.30
Boarding-house, per room, special—	
Halls, theatres, and hotels	
Laundry, public, per tub	8.00
Offices, one person with wash-basin	5.00
Offices, each additional person	2.00
Printing offices, special.	
Residences occupied by one family four rooms or less	6.00
Residences, five rooms or less	7.00
Residences, eight rooms or less	8.00
Residences, if over eight rooms, then fifty cents additional for each room.	
Restaurants, special.	
Stables, one horse, including carriage washing	2.00
97 Each additional horse or cow	2.00
Livery, boarding or sale, six horses or less including carriage washing	12.00
Livery, for each additional stall	1.60
Sprinkling lawns, 50 feet frontage per season with like frontage on streets	6.00
Urinals, private, with self-closing fixtures	4.00
Urinals for stores, banks and offices	4.00
Urinals, for restaurants and saloons, with self-closing fixtures	6.00
Urinals, public, with self-closing fixtures	8.00
Water-closets, private	4.00
Water-closets, self-closing, store-, banks and offices	5.00
Restaurants, saloons, etc., self-closing	6.00
Public "	8.00

Meter rates.

100 to 300 gallons, per 1000 gallons	.30
300 to 1000 " " "	.25
1000 to 5000 " "	.22
5000 to 10000 " "	.19
10,000 to 15,000 "	.17
15,000 to 20,000 "	.15
Above 20,000 "	.13

Fountains.

Five hours per day, for seven months	$\frac{1}{16}$-inch jet	5.00
	$\frac{1}{8}$-inch jet	8.00
	$\frac{3}{16}$	12.00
	$\frac{1}{4}$	40.00
	$\frac{1}{2}$	45.00

The cost of all pipes and plumbing from the street mains to the point where the water is to be used shall be at the expense of the subscriber taking water, said grantees have the right to control the cock at the curb line, and to determine the quality and kind
98 of pipe used between the street main and said curb line. Said grantees may make and enforce all needful rules and regulation- in the use and waste of water and charge and collect accordingly in advance there*from*, at tariff rates not exceeding those hereinbefore specified, and for all purposes not therein enumerated the rate thereof shall be special rate, not inconsistent with the terms and meaning of this ordinance.

Sec. 12. In the event that the said grantees of this franchise shall hereafter issue bonds secured by a mortgage or deed of trust upon said water works, franchises, therewith connected, rentals and rights and property, then so much of the hydrant rental payable under the terms of this ordinance as will discharge the interest upon such bonds as it shall mature from time to time, be paid by the said city to the trustee or trustees or such bonds instead of to the grantees, as herein named, when, and as such hydrant rentals are paid under the terms of this ordinance by said West Knoxville, and all payments so made to such trustee or trustees, shall be made exclusively to pay interest upon such bonds so long as the same shall remain due and unpaid, and any surplus not so payable, and the whole after said bonds shall have been discharged, shall be paid over by said city to said grantees, their successors or assigns, provided, however, that in making payments as aforesaid to the trustee or trustees as aforesaid, the said town shall be subject to no more additional trouble, liability or expense than it would be in paying the said rentals direct to said grantees, their successors or assigns; and provided, further, that the said grantees may issue mortgage bonds in sums not to exceed one hundred thousand — ($100,000) for the purchase of the necessary property and construction of said water works for West Knoxville, as hereinbefore described, and also for the Lonsdale Beaumont and Rosedale Land Companies, and adjacent territory. Said grantees may from time to time, issue bonds as provided for improvements additions and extensions to said plant in sums not exceeding the actual cost thereof.

99 And provided further that said town shall incur no liability whatever as to application of said rentals to the payment of such interest, but when such payments are made to said trustee or trustees the same shall be a complete exoneration of said town from such rentals.

Sec. XIII. After the expiration of seven (7) years, after the com-

pletion and acceptance of said water works, or at the end of any period of four years (4) thereafter, during the term of this franchise, or any renewed periods thereof, West Knoxville, or its successors, shall have the right to purchase the said water works, including the entire plant, out of as well as in West Knoxville, with the privileges, finances, and property at a fair valuation ascertained as follows: In case said city, its successor and said grantees or assigns, cannot agree as to price to be paid by said city, the said grantees or assigns for said water works, then said party shall select one competent non-resident hydraulic engineer, who shall be sworn to determine the true value of the works and the two thus appointed shall appoint a third, who shall also be sworn. When said three appraisers shall have been chosen, and before they determine the value aforesaid, the city and said grantees, or assigns, shall each, at their option, have the right to call non-resident experts, not exceeding three in behalf of each party to give testimony under oath before said appraisers as to such value. The said appraiser- in determining the value of said works, shall take into account the productive value of all rights, privileges and property and in the event that there is no existing fire-hydrant contract at the date of such appraisement, then the last existing contract shall be included in the estimate. Said appraisement shall be binding upon both parties, as to the value thereof, and the said city of West Knoxville and its successor shall have the right to purchase and become the absolute owner of said works, after such appraised value, the cost and expense of such apprais-ment to be borne equally by said parties.

And should the city or successor elect not to purchase and own the said works in manner and at the time of such apprais'-
100 ment at either of the periods named, then all the rights and privileges of this ordinance granted to said grantees, or assigns shall continue in full force and effect for the remaining term of this franchise, and the said city shall pay the entire cost of said apprais-ment, but in no case shall the amount of such apprais-ment be less than the actual costs of such works, and all additions thereto up to the time of said appraisement if purchased at the end of the seven years first named, but if purchased at any other period named, then apprais-ment shall be for value and the purchase shall be at and for the appraised or agreed value regardless of cost.

SEC. XIV. Be it further ordained That this ordinance shall not be taken, construed or held to in any way affect alter, change or release D. L. McIntyre, George W. Sturtevant, Jr., and their associates and assigns, on their contract, or they or their sureties on the bond given pursuant to an ordinance passed June 29th, 1891, and approved June 30th, 1891, for defaults made, or breaches of contract heretofore made.

SEC. XV. Be it further ordained That this ordinance take effect from and after its passage, the welfare of the corporation requiring it.

Passed final reading, September 17th, 1892.

Approved September 17, 1892.

J. W. YOE, *Mayor.*

STATE OF TENNESSEE, }
City of Knoxville, Knoxville, Tennessee. }

I, C. C. Nelson, recorder and treasurer and custodian of the books and papers of the city of Knoxville, Tennessee, do hereby certify *that* the foregoing to be a full, true and perfect copy of the ordinance it purports to give as the same appears of record in my office.

Given under my hand and the seal of the city of Knoxville, Tenn., August 1st, A. D. 1900.

101 C. C. NELSON,
Recorder & Treasurer.

{Seal Mayor & Aldermen of the City of Knoxville, Tenn. Founded 1792.}

8th.

Contract between Wheeler and Parks and North Knoxville of April 18th, 1891.

At the regular meeting of the mayor & aldermen of North Knoxville, held Saturday, April 18th, 1891, amongst other proceedings of said board an ordinance was passed on its last reading and became a law, in words, following—(See Minutes, 358 to 367, inclusive.)

Ordinance.

An ordinance to provide for a supply of water to the town of North Knoxville and its inhabitants and to authorize the making of the contract for the same with Wheeler and Parks.

SECTION 1. Be it ordained by the town council of North Knoxville, That in consideration of the public benefits to be derived therefrom, the right and privilege is hereby granted until June 3rd, 1913 unto Wheeler and Parks, of Boston, in the Commonwealth of Massachusetts, their successors and assigns (they being hereinafter designated as grantees) of erecting, maintaining and operating a system of water works, and to extend the mains and to enlarge the plant at their pleasure, in accordance with the terms and provisions of this ordinance, and of using the avenues, streets, alleys, bridges, public squares and all other public ground within the corporate limits of the town of North Knoxville, as they now exist, or may hereafter be extended or created, for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatuses for conducting and furnishing an adequate supply of good, clear and wholesome water, suitable for domestic and manufacturing purposes, to
102 the town of North Knoxville, and its inhabitants for public and private use, subject to all reasonable requirements of the town council of North Knoxville, and for making repairs to said system from time to time during the period which this ordinance and contract hereinafter authorized *or* in force.

The privileges hereinafter granted so far as they relate to furnishing water for hydrant service to be exclusive so long as the total number of hydrants rented hereunder does not exceed fifty (50).

SECTION 2ND. Be it further ordained, That the said grantees shall exercise the greatest care and diligence in the use of said avenues, streets, alleys, bridges and public places, and shall cause no unnecessary obstructions of or interruption to the public travel over or upon the same, or any permanent injury to or interference with any pipes, mains or sewers which may be lawfully located beneath the surface thereof, now or at the time any of the extensions herein provided for are made. Said grantees shall take every precaution to provide against injury to any person or property by reason of the exercise of the rights and privileges hereby granted, and shall cause all excavations and obstructions to be properly lighted at night, and take all necessary precautions for the prevention of accidents, whether prescribed by ordinance or not, and shall restore all avenues, streets, alleys and public places, when worked, or used to their former condition as near as may be without unnecessary delay and at the least inconvenience to the inhabitants of the town of North Knoxville, and the said grantees shall indemnify and save the town harmless from any and all damages that may be recovered against it by reason of their negligence while engaged in constructing or repairing said works within the corporate limits of said town of North Knoxville, or by reason of any defect therein.

SECTION 3RD. The water to be supplied under the contract hereby authorized shall be from the Tennessee river, or from other sources equally suitable, and shall be supplied from the same system
103 that supplies the city of Knoxville, or otherwise as said grantees shall elect (and said grantees shall adopt within two years from the time the contract takes effect, all necessary and proper means of filtering or otherwise purifying the same so as to render it pure and wholesome), and it is hereby stipulated that the water to be supplied hereunder shall be taken from a point above Williams creek, whenever the city of Knoxville, shall be so supplied.

SECTION 4TH. The pipes to be laid hereunder shall range from four (4) inches to twelve (12) inches interior diameter or larger. Not more than one hydrant shall be set upon any section of four (4) inch pipe, in which case said section shall be supplied at each end with larger pipe and all pipe shall be of ample size, and so arranged as to furnish a full supply of water under the minimum pressure, and to meet the tests herein provided. All pipes to be of cast iron and tested at the foundry to a pressure of three hundred (300) pounds, to the square inch, and thoroughly coated in accordance with the most approved method employed in modern practice in the coating of water pipes.

SECTION 5TH. The valves shall be located at such points as will admit of not over three blocks being isolated from the balance of the system in case of needed repairs or extensions.

SECTION 6TH. The hydrants shall be frost proof, double nozzle, of most approved pattern, with hose tips fitted to connect with such hose couplings as the town council of North Knoxville may adopt.

SECTION 7TH. The grantee will lay mains wherever, and to such extent as may be required by order of the town council of North Knoxville, be the same more or less, and will set thereon fire-hy-

drants of approved pattern at the rate of one hydrant for each six hundred feet of pipe so ordered and laid; said hydrants to be located at such points, on said pipes, as said town may elect, and said grantees will supply the same with water free of charge (for the purposes recited in section 13) until June 1st, 1892, and thereafter until said company shall have clearified by filtration, precipitation
104 or otherwise, the water to be supplied hereunder). Thereafter the rate to be paid by said town of North Knoxville for the use of said hydrants, shall be forty-five ($45.00) dollars, each per annum, payable quarterly, but shall not at any time exceed the rates paid by the city of Knoxville for hydrant service, upon extension made within the limits of the said city of Knoxville.

SECTION 8TH. And the said grantees further agree to improve the works and increase the plant from time to time, to any extent which may be needful to enable them to furnish an ample supply of good potable water as provided in section 3, for public and manufacturing and domestic use, of the entire of North Knoxville, which supply shall not be less than fifty (50) gallons per head per day, if required, for the entire population, including any increase thereof; it being provided that there shall be no unnecessary waste and to furnish each and every suburb in the vicinity of North Knoxville, upon no less favorable terms than shall from time to time govern its use in the city of Knoxville.

SECTION 9TH. Water to be furnished private consumers, shall be charged for at not exceeding the rates contained in the following schedule.

Tariff of Water Rates.

Annual rates.

Private dwellings occupied by one family—	
Four rooms or less	$6.00
Five rooms or less	7.00
Six rooms or more	8.00 and upwards.
Baths.—Bath-tubs, private	5.00
public	10.00
Water-closets, private	5.00
public	10.00
Urinals, private	5.00
public	10.00
Stores, according to occupation and use	8.00 and upwards.
Rooms over stores, according to occupant.	
105 Offices in buildings where water is generally used	8.00 "
Banks	8.00
Insurance offices	8.00 "
Saloons—special.	
Photograph galleries	15. to $50.00
Dentists' offices	10. to 20.00

Hotels and boarding-houses.

Hotels and boarding-houses—special or meter rates.

Stables, livery, and sales stables, (hose privilege extra) per stall	2.00
Private stable—per stall	2.00
Bakeries—per each barrel of flour used daily	5.00
Printing offices, exclusive of engine	10. to 25.
Steam-engines—per horse-power	2.50
Restaurants	25. to 100.00
Barber shops—first chair	5.00
each additional chair	2.00
Fountains—six hours per day for seven (7) months—	
$\frac{1}{16}$-inch jet	5.00
$\frac{1}{8}$th-inch jet	8.00
$\frac{3}{16}$ths-inch jet	12.00
$\frac{5}{16}$th'-inch jet	45.00
Building purposes—laying bricks, per thousand	.10
" stone per cu. yd	.04
Plastering per 100 sq. yds	.35

Sprinklers and street-washer-, from April 1st to November 1st—sprinkling governed by number of lineal feet front, including privileges of washing windows and sidewalks, and sprinkling lawns and street in front of your own premises.

Dwellings with lawn &c. as above, for each 50 ft. front for season	8.00

No contract made for less than one year.

106	Business houses, for each 25 feet front for season	8.00

Meter rates.

For manufacturing and mechanical purposes.

0 to 200 M gallons monthly at				10	per M.
200 to 300	"	"	"	09	" M.
Above 300	"	"	"	08	" —

For all other purposes not otherwise provided for the rate will not exceed twenty-five (25) cents per thousand gallons subject to the following discounts:

On quarterly bills of $10 to $25. discount 5 per cent.

25 to 50	10
50 to 75	15
75 to 100	20

On quarterly bills of $100. to $125. discount 25 per cent.

125 to 150	30
150 to 175	35
175 to 200	40
200 to 250	45
Exceeding 250	50

Provided that the minimum meter charge shall not be less than $10 per annum.

Making connections.

For making connections for private supply the following charges shall be made:

½-inch pipe galvanized iron	$8.00
¾ " "	10.00
1 " "	14.00

For lead pipe special rates will be given at the time according to the market price.

Black iron gas pipe is not allowed.

SECTION 10TH. The grantees further agree that they will, within a reasonable time, not exceeding three (3) years after the granting and acceptance of this ordinance, provide a high service system, and hereby agree that said system shall be capable of furnish- five
107 (5) streams of water from the five hydrants, through two hundred (200) feet of house and one (1) inch nozzle, thrown simultaneously to an average vertical height of not less than forty (40) feet. Said streams to be taken from the five highest hydrants in the town of North Knoxville, and they further agree that for all hydrants set under the provisions of this ordinance that do not indicate a pressure of twenty-five (25) pounds, or more, per square inch, as indicated by pressure guage, they will make no charge for rental for said hydrants until said high service shall have been established.

SECTION 11TH. The said grantees further agree that within thirty (30) days after the town council has ordered and located the first instalments of hydrants hereunder, and shall have notified said grantee in writing to that effect, they will place an order for pipe, hydrants &c., with reliable foundries and manufacturies; and immediately upon the delivery of such pipes, hydrants, etc. will proceed to lay and supply the same with water, and will complete the same within ninety days (90) after said pipe, etc. shall have been received; and will thereupon furnish water through the same to said town of North Knoxville, it being provided that said pipes shall be laid and water shall be furnished within six months after said first instalment of hydrants shall have been ordered. In the event of their failure to perform the agreements provided in this section said grantees will forfeit to the town of North Knoxville the sum of one thousand ($1,000) dollars as liquidated damages.

SECTION 12TH. In consideration of the benefits to accrue to it and its citizens the town of North Knoxville agrees to and hereby rents from the said grantees the fire-hydrants above mentioned, until June 3rd, 1913 at an annual rental of $45. per hydrant, payable quarterly on the 1st day of January, April, July and October, subject to the final provisions of section 7.

SECTION 13. Said grantees shall extend the mains or line of pipe whenever requested by North Knoxville, and North Knoxville will

rent an additional hydrant for every six hundred (600) feet thereof at forty-five ($45) dollars per year, payable quarterly, subject
108 to the conditions of section 7, and the water may be used from said hydrants for the extinguishment of fires and for fire protection, for necessary practice and drill of fire companies, and for flushing and washing all gutters and sewers, now or hereafter built, without payment other than the forty-five ($45) dollars per hydrant hereinbefore fixed; but in flushing gutters and sewers, not more than one hydrant shall be opened at one time; and said use shall be limited in all cases, to one hour per week for each mile of main laid within the limits of the said town of North Knoxville and in no case shall flushing be done during a fire in Knoxville, or any of its suburbs.

SECTION 14. The grantees shall supply water, not exceeding five thousand gallons per day for one ornamental fountain at such point as the town council may designate; and also water for one public watering trough for man and beast; the cost of their erection to be paid by North Knoxville, and shall also furnish water for two public school buildings and for the use of the city hall, and for the water to be so furnished North Knoxville will pay as rental a sum equivalent to the taxes assessed by it against the said grantees for the first five years, such rental to be due and payable on the same date taxes may be due and after the expiration of five years, as herein provided, said grantees shall continue to furnish water as herein provided free of charge, and pay the taxes properly assessed against them

Said grantees shall furnish water free of cost to each of the churches in said town of North Knoxville, the same to pass through self-closing fixtures; the expense of which together with all pipe and connections and the work of inserting the same to be borne by said churches respectively.

SECTION 15TH. That North Knoxville will enact all needful and requisite ordinances, within its power to do so, to protect the works and property of said grantees from damage, fraud or imposition.

That any person or persons, or corporation which shall take or use any water from the works of said grantees for domestic use or other purposes, without contracting for the same shall be
109 guilty of a misdemeanor and upon conviction shall be fined not less than five ($5.00) dollars nor more than fifty ($50.00) dollars. The said grantees shall have the right to shut off the water temporarily from the main, or any portion thereof, for the purpose of making repairs or extensions to the works, provided notice is given of the intention to cut off the water and such repairs and extensions are made without delay, and with due diligence, but if at any time the water is shut off from any cause for more than five days at a time, the rental of hydrants shall cease during the time of suspension, and no citizen who is cut off shall be liable to pay for like time.

SECTION 16TH. In the event of the construction of a system of sewerage by the town of North Knoxville, as it is now, or may be hereafter extended, said grantees will furnish, free of charge, the

necessary water to flush sewers by means of a proper efficient and well-regulated system of flushing tanks or any other well-regulated and economical method, to be constructed by the town.

SECTION 17TH. The authorities of the town to whom said duty pertains under the ordinance of the said town of North Knoxville, shall have the right to inspect the fire-hydrants at any time, and in case it shall be ascertained, by such inspection that any of the hydrants are out of repair, or otherwise inefficient, for the purposes for which they are erected, the town shall have the right to order the hydrant to be repaired, and shall at once notify the grantees, designating the defect and if within two days (2) from the receipt of such notice, the said grantees do not attend to such repairs, the town may have the same repaired at its own expense, and may deduct from the rental due to it to the grantees the cost of such necessary repairs.

SECTION 18TH. In case of accident to the works of the said grantees, the works shall be repaired as speedily as possible, and in case it shall fail to supply water for three (3) months at any time, it shall forfeit six (6) months' hydrant rental for all hydrants not supplied. It being provided that the works to be constructed
110 hereunder are to be in accordance with the most approved practice of modern art, and the pipes, hydrant valves &c. are to be of standard make and subject to the most approved tests before being used in the works, and the grantees shall maintain the water works in such manner as to enable them to comply with the terms of this contract during the entire period thereof.

SECTION 19TH. Be it further ordained That within fifteen (15) days after this ordinance takes effect, the grantees shall file their written acceptance of the same in the office of the recorder of North Knoxville, and upon this being done, this ordinance shall become the contract between the town of North Knoxville and the said grantees, their successors or assigns, the same and as fully as if its provisions were embodied in a formal written contract, made and executed between the parties. And the said grantees shall within said last-named fifteen days file with the recorder a good and solvent bond in the sum of five thousand ($5000) dollars, properly conditioned for the faithful performance of the contract herein contained, and also containing a clause, or condition providing that if said grantees shall fail to perform their agreements as contained in section 11 within the time therein specified said grantees shall forfeit to the town of North Knoxville, the sum of one thousand ($1000) dollars as liquidated damages for such failure, and they shall be also liable for damages that may accrue from any other breach of the contract herein contained.

In case of failure or neglect on the part of the grantees, to furnish an adequate supply of good, clear, and wholesome water for private and public uses during a period of six (6) months after official notice shall have been given by said town of North Knoxville, except as provided in section 3, then all rights under this ordinance, at the election of said town, shall cease and *and* determine, it being understood and agreed that this shall not apply in any case where the

failure of neglect to supply water as aforesaid for six months, is from any cause beyond the control of said grantees.

SECTION 20TH. Said grantees may assign this contract to
111 any water company now organized (or to be hereafter organized) under the laws of the State of Tennessee, and who may become their successors, and said company whether now organized or to be hereafter organized, make make a mortgage covering any and all portions of its plant, and may issue its bonds thereon. And said grantee or any water company to whom they may assign this contract may purchase the franchise and property of any other water company.

The said grantees may extend their mains at their pleasure outside the corporate limits of North Knoxville, and may make contracts with and supply water to any person or persons, and any private or municipal corporations from the system of water works herein contracted for, provided, the supply to North Knoxville, as herein contracted for, shall not be diminished thereby.

SECTION 21ST. It is hereby provided that should the said grantees be prevented from performing any of their agreements as provided for in this contract, cincluding those in section 11 by any legal or judicial interference, by any strike, or accident beyond their control, by any public calamity, or when prevented from so doing by any act of the town council of the said town of North Knoxville, they shall not be holden but such additional time shall be granted as shall reasonably cover such interference.

SECTION 22ND. It is further agreed that in case said grantees shall fail to furnish water as contemplated by this contract in section 11, for public and private purposes within twelve (12) months from date of ordering the installment of hydrants as provided in section 11, then all franchises, and privileges herein granted shall become forfeited without further notice, and this contract shall be null and void at the election of North Knoxville, but in declaring the same void the city shall not be deemed to have waived any right of action on the bond executed by said grantees for damages provided by this contract.

SECTION 23RD. And the said grantees hereby agree that they will immediately apply for a charter under the laws of the State
112 of Tennessee, authorizing the construction of the system of water works as herein provided, and organizing a company thereunder when the same shall have been granted, to whom this contract shall be assigned.

And the said town of North Knoxville hereby agrees to perform all such acts and things as are required of it in such cases under the laws of the State to perfect the charter.

The grantees, may, however, if they should elect not to organize a new corporation, assign this contract as provided in sec. 20 hereof.

SECTION 24TH. Be it further ordained That all ordinances or parts of ordinances in conflict with this ordinance be and the same are hereby repealed.

SECTION 25TH. Be it further ordained That this ordinance take

effect from and after its passage, the welfare of the corporation demanding it.

STATE OF TENNESSEE, }
City of Knoxville. }

I, C. C. Nelson, recorder and treasurer of said city and custodian of the books and papers thereof do hereby certify the foregoing to be a full, true and perfect copy of the ordinance it purports to give, as the same appears of record on the minutes of the board of M. & A. of North Knoxville, (old corporation), now in my office.

Given under my hand and seal of the said city at office, in the city of Knoxville, August 1st, A. D., 1900.

C. C. NELSON,
Recorder & Treasurer.

[Seal M. & A., Knoxville, Tenn. Founded 1791 ('2).]

9th.

Conveyance from Wheeler and Parks to the Knoxville Water Company, Dated 17th of November, 1893.

Wheeler & Parks to Knoxville Water Co. } Deed.

This indenture made and entered into on this the seventeenth day of November, A. D. 1893, by and between William Wheeler and his wife, Fannie Eleanor Wheeler, of Concord, in the county of Middlesex and Commonwealth of Massachusetts, and Charles F. Parks and his wife Anna Parks, of Waltham, in said county
113 and Commonwealth, parties of the first part, and The Knoxville Water Company, a corporation organized under the laws of the State of Tennessee, and doing business in Knoxville, in said State, party of the second part.

Witnesseth, that whereas, the said William Whe-ler and Charles F. Parks, as copartners, under the name of Wheeler and Parks, are the grantees under a contract by ordinance entered into with the town of North Knoxville, Tennessee, in April, 1891, and as such are the owners of the works which now supply said town of North Knoxville with water, and

Whereas, in section 20 of said ordinance it is provided as follows:

"SECTION 20. Said grantors may assign this contract to any water company now organized (or to be hereafter organized) under the laws of the State of Tennessee, who may become their successor and said company whether now organized or to be hereafter organized, may make a mortgage covering any or all portions of its plants and may issue its bonds thereon, and said grantees or any water company to whom they may assign this contract may purchase the franchise and property of any other water company."

Now therefore in consideration of the sum of one dollar to them

in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged and for the further consideration set forth in a contract of even date herewith between the said Knoxville Water Company and the said William Wheeler and Charles F. Parks, as copartners, under the name of Wheeler and Parks, the said parties of the first part do hereby sell, assign and set over to the party of the second part, all their right, title and interest in the aforesaid contract by ordinance granted to Wheeler and Parks by the town of North Knoxville, and in the water works and appurtenances constructed and acquired by said Wheeler and Parks, in and for North Knoxville under and by virtue of the said franchises,
114 excepting a certain lot of land situated between Sixth avenue and the East Tennessee, Virginia and Georgia railroad, opposite Cottage place, so called, together with the filter plant erected thereon and pipes connecting therewith and the buildings covering the same. The water pipes and appurtenances hereby conveyed are more minutely set forth and described in the annexed schedule marked Exhibit "A." And the parties of the first part do further sell, assign and set over to the party of the second part, their right, title and interest in all books of record and account together with all contracts and accounts for water service made acquired or possessed by them under and by virtue of their said contract with North Knoxville, and in consideration of the premises, the party of the second part shall henceforth assume all the obligations of the grantee under and by virtue of said contract by ordinance.

To have and to hold the above-granted property with all the privileges and appurtenances thereto belong- to the said Knoxville Water Company, its successors and assigns to their own use and behoof forever.

In witness whereof, the said parties of the first part have hereunto set their hands and seal- the day and year first above written.

WILLIAM WHEELER. [ ]
FANNIE ELEANOR WHEELER. [ ]
CHAS. F. PARKS. [ ]
ANNA PARKS. [ ]

STATE OF MASSACHUSETTS, }
County of Suffolk, City of Boston. }

Before me, Charles Hall Adams, a commissioner of the State of Tennessee, resident in the State of Massachusetts, appointed, qualified and commissioned to take the probate of deed-, etc., for registration and use in the State of Tennessee, personally appeared William Wheeler and Fannie Eleanor Wheeler, his wife, and Charles F. Parks and Anna Parks, his wife, the within-named bargain-
115 ors, with whom I am personally acquainted, and who severally acknowledged that they executed the foregoing instrument for the purpose therein mentioned.

And the said Fannie Eleanor Wheeler, wife of said William Wheeler, and Anna Parks, wife of Charles F. Parks, with whom I am personally acquainted, and having appeared before me privately

and apart from their respective husbands, severally acknowledged the execution of the said instrument to have been done freely voluntarily and understandingly without compulsion or constraint of their respective husbands, and for the purpose therein expressed.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office, No. 23 Court street in the city of Boston, in the county of Suffolk, and State of Massachusettes, this twenty-first day of November, A. D. 1893.

CHARLES HALL ADAMS,
Commissioner of the State of Tennessee.

{Seal Charles Hall Adams, Commissioner of the State of Tennessee, Boston, Suffolk County, Massachusetts.}

Received the 2 day of Dec. 1893, 9.30 a. m. recorded the 4 day of Dec., 1893.

M. A. M. ARMSTRONC, *Register.*

REGISTER'S OFFICE, KNOX. CO., TENN.

I, R. M. Johnson, register of said county, do certify that the foregoing is a true and perfect copy of body of the deed of Wheeler and Parks to Knoxville Water Company (this however, does not include the schedule marked Exhibit A which is attached to said deed) as the same appears of record in this office, in Book of Deeds #128, page 424.

116 Witness my hand at office in Knoxville, Tennessee, this the 24th day of July, 1901.

R. M. JOHNSON,
Register of Knox. Co., Tenn.

Endorsed: Fee $2.00 paid by F. C. K.

Mr. CATES: I now introduce the ordinance consolidating the Knoxville Water Company and the Lonsdale Beaumont Water Company. Said ordinance is found in this record at page 20.

I also introduce the conveyance from the Lonsdale-Beaumont Water Company, to the Knoxville Water Company, dated 1st day of January, 1900.

Stamp $21.10.

Lonsdale Beaumont Water Co. to Knoxville Water Co. } Deed.

This indenture made this 1st day of January, 1900, by and between the Lonsdale-Beaumont Water Company, a corporation chartered and organized under and in accordance with the laws of the State of Tennessee, and having its principal office and place of business in Knoxville, Knox county, Tennessee, party of the first part, and Knoxville Water Company, also a corporation chartered and organized under the laws of the State of Tennessee, and having its

principal office and place of business in the city of Knoxville, Knox county, Tennessee, party of the second part.

Witnesseth:—That for and in consideration of the sum of one hundred dollars ($100.00) to it paid by the said party of the second part, the covenants of the said party of the second part hereinafter set forth, and other good and valuable considerations received by said party of the first part from said party of the second part at the ensealing and delivery of these presents, the receipt whereof is hereby confessed and acknowledged the said party of the first
117 part has this day granted, bargained, sold, assigned, transferred and conveyed, and by these presents, does hereby grant, bargain, sell, assign, transfer and convey to the said party of the second part, its successors and assigns, all the property mentioned and described as follows, viz:—

First. All the real estate, and lands, and all rights, title and interest therein, including rights of way and easements, and all lines of pipes and mains, all engines, stand-pipes, and pumps which the said party of the first part now owns or of which it is possessed, and lying and being in the city of Knoxville, and in the 12th and 24th civil districts of Knox county, Tennessee.

Second. All the property, rights of way, privileges and easements conveyed to the said party of the first part by the following deeds or instruments of writing, to wit:

1st. A deed dated June 27, 1896 duly executed by the grantor therein named M. D. Swan, and recorded in the office of the register of Knox county, Tennessee, in Book of Deeds, 147, page 97 *et seq.*

2nd. A deed or agreement, dated November 12th, 1892, executed by the Middlebrook Park Association, through James H. Moore, its secretary, and recorded in the office of the register of Knox county, Tennessee, in Book of Deeds, 124, p. 322.

3rd. A certain agreement or lease dated November 7th, 1892, duly executed by Patrick J. Griffin, and recorded in the office of the register of Knox county, Tennessee, in Book of Deeds, 45, pp. 61 *et seq.*

4th. Also another certain agreement or lease dated November 7th, 1892, duly executed by Charles L. Blanc and wife, Mary J. Blanc, and recorded in the office of the register of Knox county, Tennessee, in Book of Trust Deeds, 45 pp. 63 *et seq.*

5th. Another agreement or deed duly executed by Susan J. Scruggs, and acknowledged by her on March 28, 1893, and recorded in the office of the register of Knox county, Tennessee, in Book of Trust Deeds, 49 pp. 72 & 73.

6th. Another agreement or deed dated April 11, 1893 and
118 duly executed by William D. May and wife Ellen May, and recorded in the office of the register of Knox county, Tennessee, in Book of Trust Deeds, 49, pp. 321 and 322.

7th. An agreement or deed dated June 19, 1893, and duly executed by the East Tennessee Virginia Railway Company, through its receivers, C. M. McGhee and Henry Fink, and recorded in the office of the register of Knox county, Tennessee, in Book of Trust Deeds, 53 pp. 284, *et seq.*

8th. A deed of agreement dated August 29, 1894, and duly executed by William D. May and wife Ellen May, and recorded in the officer of the register of Knox county, Tennessee, in Book of Trust Deed- 58, pp. 271 *et seq.*

9th. A deed dated November 1, 1892, and duly executed by Margaret J. Harmon, and recorded in the office of the register of Knox county, Tennessee, in Book of Deeds, 123, p. 156.

10th. A deed dated November 10th, 1892, and executed by the Beaumont Real Estate Company and recorded in the office of the register of Knox county, Tennessee, in Book of Deeds, 123, p. 179.

11th. A deed dated October 8, 1892 and duly executed by H. P. Coile and wife and others, and recorded in the office of the register of Knox county, Tennessee, in Book of Deeds, 124, pp. 137-'8-'9; to all of which conveyances and records, reference is hereby made for further and more accurate description of the property thereby conveyed to the said party of the first part hereto.

Third. Also all contracts and choses in action of whatever nature and description now owned by the part- of the first part.

Fourth. Also all rights, privileges and franchises, now owned, possessed and enjoyed by said party of the first part under and by virtue of its contract with the former town council of West Knoxville, passed and approved September 17th, 1892 and the ordinance amendatory thereof, passed by said town council on March 6th, 1894, and approved March 7th, 1894, and also all rights,
119 privileges and franchises owned by and accruing to said party of the first part under and by virtue of the ordinance of the city of Knoxville, passed on the 20th day of October, 1899, approved by the mayor of said city of Knoxville, on October 20th, 1899, and on the same day accepted by said party of the first part, and all other property of said party of the first part together with all the rights, privileges and franchises of the said party of the first part pertaining to include herein and to hereby convey all the property, rights, privileges, and franchises of whatever nature and description and wherever situated, now owned by said party of the first part, or belonging or pertaining to it as a part of its corporate property.

To have and to hold the said property, rights and franchises, and all and singular the said premises and every part together with the appurtenances unto the said party of the second part, its successors and assigns, forever.

In consideration whereof, and of the said premises, the said party of the second part agrees to, and does hereby become liable for and assumes all contracts, liabilities, obligations and duties of the said party of the first part and hereby covenants to perform, carry out and discharge the same and each and every of them and in all things save the said party of the first part harmless in respect thereto.

In witness whereof, the said parties have caused this instrument to be executed by their respective presidents and attested by their

respective secretaries and their corporate seals hereunto affixed, the day and year first above written.

LONSDALE-BEAUMONT WATER CO.,
By ELBERT WHEELER, *President.*

Attest: FRANK C. KIMBALL, *Secretary.*

KNOXVILLE WATER COMPANY,
By WILLIAM WHEELER, *President.*

Attest: JOHN J. F. MULHALL, *Secretary.*

{ Lonsdale Beaumont Water Co., Knoxville, Tenn. }

120 { Knoxville Water Co. Incorporated July, 1882. Knoxville, Tenn. }

STATE OF MASSACHUSETTS, }
County of Suffolk. }

Before me, Chas. Hall Adams, a notary public, within the State and county aforesaid, personally appeared Elbert Wheeler, with whom I am personally acquainted and who upon oath acknowledged himself to be the president of the Lonsdale-Beaumont Water Company, the within-named bargainor, a corporation, and that he as such president being authorized so to do, executed the foregoing instrument for the purpose therein contained by signing the name of the corporation by himself as president.

Witness my hand and notorial seal at office in the city of Boston, county of Suffolk, and State of Massachusetts, on this 15th day of January, 1900.

CHAS. HALL ADAMS,
Notary Public, also Commissioner of the State of Tenn.

{ Chas. Hall Adams, Commissioner of the State of Tennessee in Massachusetts, Boston, Suffolk Co., Mass. }

STATE OF MASSACHUSETTS, }
County of Suffolk. }

Before me, Chas. Hall Adams, a notary public for and within the State and county aforesaid, personally appeared *before* William Wheeler, with whom I am personally acquainted, and who upon oath acknowledged himself to be the president of the Knoxville Water Company, the within-named bargainor, a corporation, and that he, as such president being authorized so to do, executed the foregoing instrument for the purpose therein contained, by signing the name of the corporation by himself as president.

Witness my hand and official seal at office in the city of Boston, county of Suffolk, and State of Massachusetts, on this the 15th
121 day of January, 1900.

CHAS. HALL ADAMS,
Notary Public, also Commissioner of the State of Tennessee.

{ Chas. Hall Adams, Commissioner of the State of Tennessee in Massachusetts, Boston, Suffolk County, Mass. }

Received the 17th day of January, 1900, at 10.20 o'clock a. m. Recorded the 17 day of January, 1900.

R. M. JOHNSON, *Register.*

REGISTER'S OFFICE, KNOX COUNTY, TENN.

I, R. M. Johnson, register of said county, do certify that the foregoing is a full, true and perfect copy of the deed from Lonsdale-Beaumont Water Co. to Knoxville Water Co., as the same appears of record in this office in Book 159, page 468 *et seq.*

Witness my hand at office, in Knoxville, this 6th day of October.

R. M. JOHNSON, *Register.*

(Stamp.)

I, Wm. S. Morgan, secretary of state, do certify that this instrument and certificate, the foregoing of which is a true copy, was this day registered and certified to by me. This October 13, 1900.

WM. S. MORGAN,
Sec'ty of State.

I, Wm. S. Morgan, secretary of state of Tennessee, do certify that the foregoing is a true copy of the deed from Lonsdale Beaumont Water Company, to Knoxville Water Company, as the same appears of record in this office, in Book P 4 page 427.

In testimony whereof, I have hereunto subscribed my official signature, and by order of the governor, affixed the great seal of the State of Tennessee, at the department in the city of Nashville
122 this 13 day of October, 1900.

WM. S. MORGAN,
Secretary of State.

{ The Great Seal of the State of Tennessee, 1796. Agriculture, Commerce. }

F. C. KIMBALL, superintendent of Knoxville Water Company, on being duly sworn, testified as follows:

Examined by Mr. CATES:

Q. Your name is Frank C. Kimball?

A. Yes sir.

Q. What business are you engaged in?

A. Superintendent Knoxville Water Company.

Q. Are you an civil engineer by profession?

A. I am.

Q. How long have you been connected with the Knoxville Water Company?

A. In my present position since January 11th, 1899, and in various other capacities, since June 1890.

Q. Do you know what rates were existing, in force, and charged by the Knoxville Water Company, to its patrons in the city of Knoxville, on October 20th, 1899?

A. Yes sir.

Q. Have you a copy of these rates, rules and regulations?

A. Yes sir, dated April 1, 1895.

Q. Examine this pamphlet and state whether or not that is a copy of the rates, rules and regulations in force on October 20th, 1899?

A. It is.

Q. In force in the whole city of Knoxville, or in what parts of the city of Knoxville?

A. They are the rates that were in force over the entire city, except that portion known as West Knoxville, the tenth ward, I
123 believe it was.

Q. What rates were in force in that part of the *time* at that time?

A. The rates as laid down in the contract between the Lonsdale-Beaumont Water Company and the town of West Knoxville.

Q. Do you mean the rates provided in the ordinance passed by the town council of West Knoxville, on September 17th, 1892? were in force in the 10th ward of the city?

A. Yes.

Q. Now Mr. Kimball I will ask you to please state whether since the passage of the ordinance of October, 20th, 1899, the water company has been in all respects complying with that ordinance, and the rates therein prescribed.

A. They have.

Q. I will ask you to state whether or not the charges complained of in this case are the same charges stipulated for and provided in this ordinance of October 20th, 1899?

A. They are.

Q. I will ask you to state Mr. Kimball, whether the water plant in what is now the 11th ward of the city of Knoxville, formerly the town of North Knoxville, was built under that contract between Wheeler & Parks, and the town of North Knoxville dated April 18th, 1891?

A. Yes it was.

Q. I will ask you to state Mr. Kimball whether that part of the water plant built by the Lonsdale Beaumont Water Company in what was formerly known and called the corporation of West Knoxville, now the tenth ward of the city of Knoxville was built under the contract between the town of West Knoxville, and the Lonsdale-Beaumont Water Company, dated September 17th, 1892?

A. I presume it was.

Q. Please state whether the Knoxville Water Company furnis[h] the city of Knoxville with water for other than hydrant use, and [i]f so, at what rate of charge?

A. Yes for many purposes, some of which are free under the contract of July 1st, 1882, and other uses are paid for under
124 the rates in force by the Knoxville Water Company.

Q. Mr. Kimball, how many individual consumers has the Knoxville Water Company, who have contracts similar to the Gratz contract?

A. I can't answer that question exactly but between forty-five and forty-six hundred at the present time.

Q. How many paid their bills under protest in July?

A. If you will allow me to look at that paper to refresh my recollection a little I will tell you. Of bills rendered July 1st, out of 3991, that were collected up to July 26th, 64 were paid under protest, or 1.64 per cent. of the whole.

Mr TURNER: I object to the question and answer because the same is immaterial to the issues in this cause.

The COURT: I will overrule your objection.

Plaintiff excepted.

Cross-examined by Mr. TURNER:

Q. Mr. Kimball the charges that the Knoxville Water Company made upon Mr. McClure, and which were paid by him according to his testimony in this case, you have stated were under the rates or according to the rates in force in October 1899, were they?

A. Yes sir.

Q. They were in excess of the rates fixed by the ordinance of March 30th, 1901, were they not?

A. So far as my recollection of that latter ordinance yes, although I am not positive, so I have not specifically compared them.

Re-examined by Mr. CATES:

Q. Let us see what is the difference. Now what had he paid on the house or premises at 724 West Church street, Knoxville, Tenn.?

A. He paid $3.22 for the quarter from April 1st to June 30th.

Q. Do you know what that included?

A. Yes sir.

Q. What?

A. Seven-room house at $8.50 per year, one water-closet at $5.00 per year, a total of $15.58, or $3.38 for the quarter, less 16
125 cents cash discount, making $3.22.

Q. Mr. Kimball what did you charge for the premises 720 West Church street, and what was paid to the company on that account?

A. $2.62 water rent from April 1st to June 30th.

Q. And what did that cover?

A. It covered a four-room house at $6.00 per year, water-closet at $5.00 total of $11.00 divided into quarters, $2.75, with cash discount of 13 cents, leaving a net of $2.62.

Q. What is your rate of cash discount?

A. Five per cent. on amount of our bills if paid within ten days of date. Ten per cent. on those within the tenth ward in accordance with the contract.

Q. Now there is another house mentioned by Mr. McClure in his evidence, 706 High street—what was the amount paid on account of that house?

A. $1.43.

Q. For what?

A. A four-room house at the rate of $6.00 a year, $1.50 per quarter with cash discount of seven cents, leaving a net of $1.43 which he paid.

Q. Now I will ask you to state whether or not all of those charges were made and payments received in accordance with the rates in force on 20th day of October, 1899?

A. Yes they were.

Q. Did Mr. McClure live in either one of these houses?

A. No.

Q. Where does he live?

A. He lives on Yale avenue, 2111 West Knoxville.

Q. In what ward of the city—the same as the former town of West Knoxville was situated within?

A. Yes.

Q. Covered by the terms of the Lonsdale-Beaumont contract?

A. Yes sir.

Q. Were charges rendered against him for the quarter commencing April 1st, and ending June 30th in accordance with the Lonsdale-Beaumont contract?

126 Mr. TURNER: I object to this question because it is immaterial to the issues in this case.

The COURT: He may answer.

Mr. CATES: I ask you what amount he paid you for that quarter?

WITNESS: On Yale Avenue house?

Mr. CATES: Yes.

WITNESS: $3.60.

Q. What would it have been under said ordinance?

A. Under the ordinance as published in the paper it would have been $3.85.

Q. And by said ordinance you mean this alleged ordinance of March 30th, 1901?

A. Yes sir.

Q. The ordinance published in the paper on March 31, 1901?

A. Yes, the one that is published, or was published in the paper of March 31st, 1901.

Mr. CATES: I now offer a copy of the rates, rules and regulations and plumbers' guide of the Knoxville Water Company, of April 1, 1895.

"Read this carefully.

Rates, Rules & Regulations, and Plumbers' Guide of the Knoxville Water Company.

Knoxville, Tennessee, April 1, 1895.

127 *Schedule of Annual Rates for the Use of Water.*

Private dwellings occupied by one family.

Four rooms or less	$6.00
Five rooms	7.00
Six rooms	8.00
Each additional room	.50
One bath-tub for one family	5.00
Each additional bath-tub	3.00

One water-closet of approved kind, for one family	5.00
Each additional water-closet	3.00

Where water-closets or privy vaults are flushed with water from the sink or other fixtures, a water-closet rate will be charged.

One self-closing urinal for one family	3.00
For each additional urinal	2.00

Where a house is occupied by more than one family, and all are supplied by either the same or separate fixtures, full rates will be charged each family, the same as if living in a separate house.

No fixtures from which water can be drawn for general purposes, shall be allowed unless family rate is also paid. This rule is general and applies to stores, offices, etc.

Where two faucets are used at one basin one for hot and one for cold water, but one charge will be made; and the same applies to boarding and lodging houses.

Boarding & lodging houses.

Six rooms or less	10.00
Each additional room	1.00
One bath-tub	8.00
Each additional bath-tub	5.00
128 One water-closet	8.00
Each additional water-closet	5.00
One self-closing urinal	5.00
Each additional urinal	3.00

Hotels.

Meter rates.

Stores, offices, warehouses, and workshops.

For general uses not specially rated and requiring not more than ordinary supply of water.

One faucet for 1 tenant	$8.00
Each additional faucet not rated below	3.00

Bakeries.

Per barrel of flour used daily	$5.00
No rate less than	8.00

Barber shops.

One faucet, one chair	$5.00
Each additional faucet	2.00
Each additional chair	2.00
No rate less than	8.00

Baths.

Public, one tub	$10.00
Each additional tub	5.00

Dental offices.

1 faucet, 1 chair	$8.00
Each additional chair	2.00
Each additional faucet	2.00

Druggists and apothecaries.

1 faucet	$12.00
Each additional faucet	3.00

Soda fountains.

Meter rates.

Tumbler-washers.

Meter rates.

Public laundries.

Meter rates.

129 Motors.

Meter rates.

Markets.

One faucet	$8.00 to 12.00
Each additional faucet	3.00

Printing offices.

Exclusive of water for engine or power	$8.00 to 25.00
Photograph galleries	12.00 to 50.00
Public bar-rooms	10.00 to 25.00

Restaurants and dining saloons.

Without a public bar	$8.00

and 50 cents additional for each chair for table guests.

Steam boilers.

Per horse-power	2.50

Bath-tubs, water-closets, and urinals for private use connected with a store, office etc., will be charged for at the same rate as for private dwellings; those connected with bar-rooms restaurants, office building, saloons etc., will be charged for at boarding and lodging house rates.

Stables.

Livery and sales stables, meter rates.

Private stables, each horse or cow	2.00

Private stables, hose privilege extra.

Hose sprinklers and street-washers.

No hose allowed unless water is taken for other purposes at the rate provided therefor. Rates governed by number of lineal feet frontage, and include the privilege of washing windows and side-

walks, and sprinkling lawns, also street in front of taker's premises, from April 1st to November 1st, each year.

130 A sprinkling rate will be charged where there is a hose fixture, whether same is used or not. When water is turned on to any service having hose fixture or when hose fixture is added the rate for sprinkling shall be proportioned as follows: On or before January 1st, full season rate will be charged, after July 1st, one-fourth full season rate will be charged per month for all unexpired time of the sprinkling season.

Hose fixtures must not be converted into jets or fountains, nor shall the hose during sprinkling be secured to any frame, post, tree or mechanical device whatever, but shall be held in the hand.

Revolving lawn-sprinklers and other like devices are rated as fountains, and unless additional or fountain rates are paid, their use is prohibited.

Dwellings, with lawn etc., as above—

First fifty feet frontage or less	$8.00
Each additional fifty feet	4.00

It being provided that premises having less than seventy-five feet shall be rated as of fifty feet, and those having more shall be rated as of one hundred feet.

Business houses.

For first twenty-five feet frontage, or less	$6.00
Each additional twenty-five feet	3.00

It being provided that premises having less than thirty-seven and one-half feet shall be rated as twenty-five feet, and those having more as fifty feet.

The use of hose and hose sprinklers is limited to two hours daily, between 6 and 8 o'clock a. m. or 5 and 7 o'clock p. m. as users may elect, with nozzles not exceeding one-quarter inch orifice.

Fountains.

Use limited to six (6) hours only per day, for seven months each year.

For a jet of one-sixteenth inch	5.00
For a jet of one-eighth inch	8.00
131 For a jet of three-sixteenths inch	12.00
" " one-quarter "	25.00
For a jet of five-sixteenths "	45.00

or by meter, at the discretion of the company.

Building purposes.

Mortar for laying brick, per thousand	.10
" " " " per cu. yd	.04
" " plastering, per 100 sq. yds	.35
Mortar for other purposes for each cask of lime or cement used	.10
Cement sidewalks, per 100 sq. ft	.25

The company reserves the right to attach a meter to any service at its option, and in lieu of the above rates, charge the following:—

Meter rates.

0 to 50 M	gals.	monthly,	25c.	per M	gallons.
50 to 100 M	"	"	20c.	"	"
100 to 150 M	"	"	15c.	"	"
150 to 200 M	"	"	12c.	"	"
200 to 250 M	"	"	10c.	"	"
250 to 350 M	"	"	9c.	"	"
350 to 1,000,000	gals.	"	8c.	"	"
Above 1,000,000	"	"	7c.	"	"

Provided, that the charge at any given rate shall not exceed the maximum charge at the next lower rate.

Provided, that the minimum meter charge shall not be less than $10.00 per annum and meter rent.

Meter rent.

$1.00 per annum for each ¾-inch nominal size of meter.

Elevator service.

For amount of water used as registered by the indicator, meter rates will be charged.

Hydraulic elevators and indicators must be kept in repair and proper working order at the expense of the owner or occupant of premises. When the indicator is out of order and is not re-
132 paired within a reasonable time, the supply will be turned off.

Fire protection.

Automatic sprinklers or hose outlets used exclusively for fire protection in buildings—for each 1,000 sq. ft. of floor surface, or fraction thereof, per annum 3.00.

Provided, that the amount of water rent paid for other purposes on premises having fire-protection fixtures shall be abated to an amount not exceeding the charge for said fire protection as per above.

Fire-hydrants with outlets like or similar to city hydrants, each per annum.....$45.00

and no reduction or abatement on account of water used for other purposes at the rate provided therefor.

All fixtures used exclusively for fire protection shall be sealed by the water company, and said seals shall not be broken except in case of fire. If any seals are found broken, except for said cause, the water will be shut off until all water used from said fixtures has been paid for, and in addition thereto, the sum of $10.00 for labor, breach of contract, etc.

Cisterns.

No cisterns filled where parties may be supplied from mains unless application for water has been made, then for $2.00 a permit

will be granted to fill one, pending the laying of main, and service attachment. If supply immediately follows the cistern charge will be refunded. Parties who cannot be supplied from mains may obtain permit at above rate.

Rules and Regulations.

(Subject to additions and amendments.)

The water company imposes no restrictions upon its patrons which impair their right to the use of water for all necessary purposes; but only such as are necessary to prevent waste, and for the
133 mutual protection of the water company and its customers.

The following rules and regulations shall govern the use of water under the foregoing rates, and shall therefore be considered a part of the contract with every person who shall be supplied thereunder.

Application for Water.

1. All applications for the introduction and use of water must be entered upon the application book at the company's office, which is to be filled out, stating fully and truly the use to which the water is to be applied, and signed by the owner of the premises to be so supplied, or a duly authorized agent, before the supply will be furnished; and said application shall constitute the contract between the water company and said owner, and shall be held to bind said owner for one year, and to further bind said owner for this and such further time as the water shall be turned on, to pay to the water company its established rates, and to comply with all its rules and regulations. At any time, after the expiration of one year from the date of application the water will be turned off at the option of the owner, upon notice left at the office of the company.

2. Service pipes will be laid in all cases by the water company from the main to the street line, and the same furnished with a curb stop and all other hardware within street limits, and also a stop and waste properly protected, just inside the property line, so arranged as to be accessible at all time to the occupants of the premises. The owner of the premises will be charged the sum of ten dollars for each service attachment of three-quarters of an inch in diameter, so made; which sum shall be due and payable at the time the application is made.

3. The company reserves the right to refuse to allow the work of any plumber to be connected with its pipes, unless such plumber has complied in all cases with its rules and regulations pe-tinent thereto. The water will not be turned on to any premises, until the plumber has reported in writing to the office of the company the number and kind of fixtures he has connected with the pipes,
134 as required. (See section 4 of Plumbers' Guide and Rules.)

4. No addition to or alteration of any pipe or fixture, changing or affecting the use of water, shall be made by any person without permission in writing of the water company. Any

such change of fixtures, or any improper use of water will be charged for at 50% above the schedule rates: and if not paid promptly, the water will be shut off, and it will not be let on until all dues are paid, with the additional payment of one dollars for turning off and on; and no abatement will be made for the time the water is so shut off.

5. When water shall be supplied to more than one owner or tenant through a single tap, the bill for the whole supply furnished through such tap will be made to one of the owners, who shall agree to be responsible therefor. In case of non-payment of any portion of the rates due thereon, the right is reserved to shut off the water from the whole, notwithstanding a portion thereof may have been paid.

6. In all occupied premises, where no meter is used, every faucet, water-closet, bath-tub, set-basin, sink fountain or any other fixture, *whether used or not*, will be deemed and held as used, and will be charged for so long as it shall remain connected with the service pipes. Parties desiring to discontinue the use of any fixtures, must have the same disconnected, and then the charge for their use, (except for sprinkling which is charged for by the season) will cease from the time when notice of the same is left at the company's office.

7. Owners shall be so far responsbile for tenants that no new tenant shall be entitled to a supply until all arrears for water used on the premises are paid.

8. The company, by its agent, may enter the premises of any water-taker at all reasonable times, to examine the pipes and fixtures, the quantity of water used, and the manner of its use.

9. No consumer shall supply other persons or families with water for use elsewhere, nor suffer them to take it from the premises, nor shall any person take or carry away water from any hydrant, watering trough, or public fountain, without the consent of the company.

Any person found violating the above rule will be prosecuted to the full extent of the law provided in such cases.

10. There shall be no waste of water, no concealement of the purposes for which it is used, *and it must not be left running to prevent freezing*, and all devices, permitting a continuous flow of water, where it is not metered, are strictly prohibited unless a special permit for their use is obtained from the water company.

11. All persons taking the water shall keep the service pipes within their premises, in good repair and protected from frost at their own expense; and they will be held liable for all damages which may result from a failure to do so. The company reserves the right, whenever it shall find any fixtures leaking or in bad condition, thereby causing a waste of water, to shut off the water from the premises, *without notice*, and to keep the same shut off until all the fixtures shall have been repaired and put in good condition.

12. The company reserves the right to shut off the water from any of the mains, upon notice, while making extensions and repairs, and all similar purposes; also to shut off the water without such notice,

whenever the exigencies of the case require, and to keep it shut off only as long as may be necessary.

13. The company also reserves the right, whenever it shall be deemed necessary to keep up the supply for fire protection and domestic purposes, to temporarily stop the supply for hose, fountains, elevators, etc.

14. All bills due the company are payable at its office, those for regular water rates quarterly, and in advance, on the first days of January, April, July and October; all other bills for water, labor or materials, at the time of their contraction.

If any bills remain unpaid for twenty days after they become due, the water will be shut off, and on all bills paid after the water has been shut off, the sum of one dollar, in addition to the amount
136 of the bill, must be paid before the water will be turned on again.

15. For all vacated premises where the water can be shut off without depriving takers, abatements will made for the whole time they are vacant; but a charge of fifty cents will be made for shutting off and letting on the water. All such abatements will date from the time when notice of vacancy is left at the office of the company, and *no abatement will be made unless such notice is given.*

16. In case of violation by a water-taker of any regulation established by the company, or for the unlawful or surreptitious use of water, the supply may be shut off from the premises in default, and it will not again be let on until all cause of complaint shall have been removed and dues paid, with an additional payment of one dollar for turning the water off and on, and no abatement will be made for the time the water is so shut off.

17. Any person turning on the curb cocks, or in any way meddling with the same or other property of the company, unless duly authorized by the superintendent of the water company, will be prosecuted to the full extent of the law.

18. No person shall open or interfere with any of the fire-hydrants without permission of the company or of the chief engineer of the fire department.

19. It is expressly stipulated by the company that no claim shall be made against it or the city by reason of the breaking of any fixture or service pipe within the premises of any consumer.

20. The right is reserved to amend or add to these rules and regulations as circumstances may show to be necessary.

Plumbers' Guide and Rules Governing the Introduction of Water.

1. No person shall do any work in connection with the introduction of water into any premises, or alter or extend the service, except he or they be duly licensed by the Knoxville Water Company;
137 and if the ordinances of the city of Knoxville shall so require, by the said city also.

2. A plumber wishing to do business in connection with the said water works, shall first give a bond to the said water company, with surety or sureties approved by said company, in the penal sum of

one thousand dollars, that he will be governed by the existing rules and regulations of the water company, and also any that may hereafter be made, and to indemnify and save harmless the city of Knoxville and the Knoxville Water Company of and from all accidents, damages and losses, which either may sustain by reason of negligence on his part or by any lack of compliance with such rules and regulations as are now or may hereafter be established by the city or the water company, or from the use of defective material, or bad work.

3. All taps will be made, and all service pipe as *as* far as the property line, including stop-cock, service box and stop and waste, will be furnished and laid by the water company upon the application of the owner of the premises. Pipes must be connected up in the trench to the property line so that immediate connections can be made and the work inspected, while under pressure, by the inspector of the company.

4. Before performing any work that involves tapping the mains, the plumber must have a permit from the office of the water company, and within twenty-four hours after having completed the work covered by said permit, must return it to the office, with a report of the work done, in accordance with sec. 10, showing exactly what he has done, kind of pipe used, number of fixtures, attached, and especially refer to hose connections, if any. The water will not be turned on to any premises until the plumber shall have filed his report as above. After the water has been turned on, if any plumber makes any alterations in any of the pipes, or any addition to the fixtures he shall immediately make due return of the same to the office of the company upon blanks furnished him for that purpose.

5. All iron pipe must be galvanized or otherwise protected
138 by some process satisfactory to the superintendent of the water company, and strong enough to sustain a pressure of not less than two hundred pounds to the square inch. In connecting lead pipe with iron pipe a brass coupling must be used, and in no case can lead be soldered to iron. On service work, and on all pipe buried in the ground, where lead is used, the joints must be extra strong and well made.

6. All service pipe must be laid at least thirty inches below the surface of the ground, and kept in good repair at the expense of the owner.

7. No out-of-door fixtures will be allowed excepting surface hydrants (known as street-washers) and all cocks, and these are to be used only for the purpose of attaching hose for sprinkling and in no case will yard hydrants or other out-of-door appliances for furnishing water be allowed.

8. It shall be the duty of the plumber before making returns to inform persons having hose bibbs or hose connection, that a hose rate will be charged by the company, whether the occupant has hose or not.

9. Diagrams must accompany the return of the permit, and must be made specific. They are an important element in the company's

record, and are intended to be so accurate that all parts of the service pipe buried in the ground can be easily found by the company's inspector, and the diagram must be made to show by measurements the location of all parts of it, so that it can be readily found after having been covered.

10. No extension or alteration of any service pipe or fixture can be made without notifying the office of the company, under penalty of forfeiture of his license by the plumber.

11. For the purpose of preventing waste of water, by the improper design or construction of water fixtures, the company reserves the right to control their selection. Plug cocks will not be allowed, except for stop and waste cocks. All urinals shall be operated with self-closing valves. No water-closet fixtures allowed, except those of approved pattern, and flushed from a tank.

139 12. Any failure to comply with these rules will cause the license of any plumber to be revoked or suspended at the discretion of the company.

13. The company will not allow its mains to be connected with the work of any plumber who has violated any of the above rules; or if connected before any such violation takes place, will not allow the water to be turned on until the plumber so violating the rules shall have made good his default and renewed his license.

14. Under no circumstances will the plumber be permitted to turn the curb cock off or on, or in any way meddle with it or other property of the company, under penalty of forfeiture of his license.

Defendant here rested.

Plaintiff in Rebuttal.

S. G. HEISKELL, the first witness, being duly sworn, testified as follows:

Examined by Mr. TURNER:

Q. Are you the mayor of the city of Knoxville.

A. Yes.

Q. How long have you occupied the office this time?

A. Since January 23rd, 1900. The first time from January 23rd 1896 to January 23rd 1898.

Q. There is a call offered in evidence in this case for a special meeting of the city council on March 30, 1901, and appears to have been signed "S. G. Heiskell, mayor by J. J. Atkins, chief of police." Did you issue that call, and authorize J. J. Atkins to sign your name to it?

A. Yes ordinarily, that is the way I issue calls. Sometimes I write them out myself, and sometimes I just tell the chief to write them out and sign my name to them.

The COURT: So much of the answer "yes" is competent, the remainder is irrelevant.

Plaintiff excepted.

Mr. CATES: Of course I object to the witness stating what
140 he ordinarily does, because it is immaterial in this present case.

WITNESS: All called meetings signed by S. G. Heiskell — by J. J. Atkins, are authorized by me.

Mr. CATES: I object to the witness' statement because immaterial and irrelevant and has nothing to do with any issue in this case.

The COURT: The testimony of witness about other calls than those in question is irrevelant.

Plaintiff excepted.

Mr. TURNER: The return of the chief of police upon the summons or notice for the meeting of March 9, 1901, indicates that Alderman Aiken, Trigg and Cleage were out of the city. Was Alderman Aiken present at that meeting or not?

A. My recollection is that Alderman Aiken came to the meeting, that is the way I remember it.

Q. Where was Alderman Trigg at that time?

A. Alderman Trigg was I think in Washington.

Q. For what purpose had he gone to Washington?

A. He had moved there or intended to.

Q. At what time did he leave Knoxville and go to Washington for that purpose?

A. I can't tell you the date. I can come nearer to it by giving you this sort of an answer or statement. Trigg had not been present at the meeting of the city council for between one and two months before his resignation was actually put into the council and formally acdepted.

Mr. CATES: I object to this statement of the witnesss because the minutes of the council will show whether or not Alderman Trigg was present, and because such a statement of the witness is absolutely irrelevant and immaterial to any issue in this case.

The COURT: I will let the facts go in and reserve my ruling.

Defendant excepted.

Mr. HEISKELL: I want to gi-e the facts as best I can.

Mr. TURNER: That is about the best way I can explain it. Just the exact number of days he had been out of the city before
141 his resignation was put in I could not tell you but I know that he had not been at the meetings for between one and two months.

Q. What had been the cause of his absence from the meetings during that time?

A. He was in Washington most of the time. He took his family and moved there to become a resident of Washington. His resignation was presented to the council March 15th, 1901, and was accepted as of that date.

Q. But as a matter of fact he had removed from Knoxville to Washington previous to that date?

A. Yes sir. He had been out of Knoxville probably six weeks.

Q. Do you know whether he had left his resignation to be presented to the council some time before it was actually presented?

A. I only know that by the fact that the city comptroller who will be here as a witness, told me he had it in his possession.

Mr. CATES: I object to the answer of the witness and because for ground say it is immaterial.

Mr. TURNER: I do not insist on the hearsay part of it.

Mr. HEISKELL: Well I can put it this way—that Trigg told me himself, about the time that he actually left the city from a month to six weeks before his resignation was handed in, he told me his resignation was in the hands of the city comptroller, and that he was goind to Washington to make his home.

Mr. CATES: I object to the answer of the witness because it is hearsay.

The COURT: I think that it would be competent to prove the facts in reference to his residence.

Mr. CATES: I except to the action of the court.

Q. At that time March 9th, 1901, was Alderman Cleage present at the meeting or in the city of Knoxville.

A. No.

Q. Do you know where he was?

142 A. I know that a good deal like I know where Trigg was. I know Cleage's business, or at least know what he has told me about it. I know he worked for the railroad in North Carolina—the Southern railway—I know it in that way.

Q. How long have you been either connected with or familiar with the proceedings of the city government of Knoxville?

A. Well I have been officially connected with it as I stated to you, two terms as mayor, then I was alderman in 1882 and city attorney in 1884 for one year at a time in each position, making nearly six years I have been connected with it.

Q. During that time do you know what the practice and custom of the city government was with regard to giving notice to the aldermen of special meetings of the council?

A. Yes I know it.

Q. What was the custom with regard to giving notice to the aldermen?

Mr. CATES: I object because what might have been the practice or custon has absolutely nothing to do with this case, and because the method for calling a special meeting is specifically designated by law and in the charter of the city.

The COURT: He may answer.

Mr. CATES: I desire to reserve an exception.

Mr. HEISKELL: The custom is, Mr. Turner, so far as the six years that I personally know about, to summon those aldermen who are in town. An alderman who is not in town is not summoned and no effort made to summon him, or at least none was made during the six years I have been connected with the city government.

Q. During that time and particularly during the present term of your office as mayor is that the custom and practice and is it well known to the members of the council to be the custom?

A. Yes every one of them know it as well as they know my name.

Mr. CATES: I continue the same objection to this testimony.

Q. At the called meeting of March 30th, 1901, was Alderman Cleage present?

143 A. No sir.

Q. Where was he at that time?

A. I will answer you just as I did before; from his statements to me about his occupation, that he was in North Carolina. He has told me since this suit has come up that he was in North Carolina.

The COURT: I admitted some testimony awhile ago as to the declarations of Trigg in reference to his intention of changing his residence but as all of this evidence is excepted to by defendant. I think that this objection should be sustained as Alderman Cleage is here as a witness. It would therefore be incompetent.

Q. How long have you been a resident of the city of Knoxville?

A. We came here on Christmas day, 1861.

Q. During that time have daily papers been published in Knoxville?

A. I can tell you back as far as 1866. I can remember back that far as far as daily papers are concerned.

Q. And for how long now since 1866 has a Sunday issue of these daily papers been published?

A. Yes it is or has been published ever since 1866. There was a while, however, prior to 1880 that there was no Monday issue published just after 1880—I know this because I was about to buy with Alex Summers and Jim Wallace, the old Knoxville Tribune and I did not go into the deal but concluded to practice law on. They bought it and shortly afterwards began to publish a Monday issue—since 1880 there has been a seven-day paper and before that a six-day paper in Knoxville.

Mr. CATES: I object to all of this testimony in regard to publication of a Sunday paper in Knoxville all these years because I think it is immaterial and irrelevant to any issue in this lawsuit.

The COURT: I think it may be shown as a circumstance. I think it would be competent.

144 Q. During that time have these Sunday issues been one of the regular issues of the daily papers?

A. Yes sir.

Q. How do the Sunday issues of these papers compare with the issues of other days in respect to circulation?

A. It is the largest of the week.

Q. As an advertising medium how does the Sunday issue of the paper compare with the issues of other days of the week?

A. It is considered the best because the edition is the largest and reaches more people.

Mr. CATES: I object to this proof in regard to editions and what the witness says about it being read by more people because it is im-

material, and irrelevant, and the edition could only be proven by the edition itself.

The COURT: I will allow them to prove it.

Defendant excepted.

Mr. TURNER: Was that the state of facts with regard to the issuance of a Sunday paper and its circulation on March 31st 1901?

A. Yes sir, that ordinance was published in the Knoxville Journal and Tribune on that date. I think it was published on Sunday.

The COURT: I will say that I do not think that part of the statement of the witness which expresses the opinion that he considers it the best advertising edition is competent.

Q. Does the Sunday issue of the paper have a larger circulation in the city of Knoxville than any issue of the other days of the week.

A. Yes sir.

Q. The Knoxville Journal and Tribune is one of the daily papers of the city of Knoxville, and has been for some time?

A. Yes, it is one of the two papers of the city.

Cross-examined by Mr. CATES:

Q. Mr. Heiskell, do you know when Trigg left Knoxville?

A. The exact date I do not.

145 Q. Do you know the date of the last meeting of the council which he attended?

A. I can explain that Mr. Cates in this way. Trigg was to attend one meeting of the council before he left the city which he did not attend. I know that Trigg was expected at that meeting, and did not come at that time his resignation was in the hands of Mr. McMillan.

Q. I did not ask you about his resignation Mr. Heiskell. I asked you if you knew the date of the last meeting he attended.

A. I can't recall the date without looking at the minutes.

Q. How do you know his resignation was in the hands of Mr. McMillan?

A. He told me so.

Q. Who? Trigg or McMillan?

A. Both.

Q. Now there was no effort made to notify Mr. Cleage of the meeting of March 30th, 1901, was there?

A. I take it not.

Q. Now when did you first see the call of March 30th, 1901?

A. The probabilities are that I never actually saw the paper that the call was written on until it was read in the city council meeting. As I stated I would request Capt. Atkins to call a meeting and give him what was to be inserted in the call, and he would sign my name to it by himself as chief of police, and when he had executed the call, he would return it to the recorder and the recorder would read it to

the city council so as to define to them what was the order of business in the meeting.

Q. Now is it not a fact that you did not see this particular call of March 30, 1901, until it had become known that the question was going to be raised that Alderman Cleage was not notified.

A. No, for as I say I gave the chief of police my request to him to call a meeting. He writes out the call and signs my name
146 to it and goes and executes it and then returns it to the recorder and the recorder reads them at the meetings, and I see every one when I am present.

Q. Have you any recollection of seeing this particular one that night?

A. I remember that it was a called meeting. The call was read so I am bound to have seen it.

Q. And that is the only way you can say you saw that call that night?

A. Yes. I also recognize the fact that in the call that we were considering the subjects that are named therein and I told him to call it for that purpose.

Q. What time in the evening did you request him to make this call?

A. I don't think I did it in the evening. I usually notify Capt. Atkins in the morning to call meeting for the evening of the succeeding day.

Q. Is it not a fact that you did not say anything to Capt. Atkins about this particular called meeting until after the evening paper had been issued?

A. I have no recollection of such a circumstance.

Q. Then you have no recollection of the time when you did speak to him about this particular meeting?

A. No I am speaking in a general way as to this fact, that when there is a called meeting in order to give time to get around I usually notified him in the morning to call it for the next night so as to get enough on hand in time to attend to it.

Q. The question I asked, is this: You have no specific recollection about the time when he was instructed to make this call?

A. To give you the specific hour I could not.

Q. You do know as a matter of fact do you not, that it was not mentioned in the evening paper?

A. I do not know. That would be no criterion as to when I would call it for I do not always give the calls to the evening paper or any other paper. Sometime I do and sometimes I do not.

Q. Who is J. J. Atkins?

147 A. Chief of police.

Q. Do you have any specific recollection in regard to talking to him about this particular call of March 30th, 1901?

A. I have specific recollection of telling him to call a meeting for the subjects therein named, because one especial subject was the widening of Prince street in which I was very much interested. I know that we considered that subject at that meeting. That was one of the things that I wanted done this year.

Q. J. J. Atkins is not by the charter of the city authorized to call or issue calls for special meetings, is he?

A. I think he is under my directions. I authorized him to sign my name to the call, and it is the same thing.

Q. But there is no power vested in the chief of police under the charter of the city to sign your name to a call?

A. The charter authorizes mayor to call special meeting at his discretion, and the mayor can write his own name down or authorize Mr. Atkins to sign his name to the call, which has been done for the six years I have been connected with the government. Every mayor of Knoxville has done it.

Mr. CATES: I object to the statement by the witness of what other mayors have done.

Mr. HEISKELL: The chief of police would have a right to sign my name to a call if I so authorized him, and this I did.

The COURT: You will confine yourself as to how you called the meetings.

Mr. CATES: As to the call of March 9th, 1901, do you know when you issued that call?

A. I can give you the same answer I gave you to the other. Let me see it. This one appears to have been signed by me.

Q. Do you recollect when you issued it?

Mr. HEISKELL: You mean the specific hour when I wrote it. No sir, I could not tell you.

Q. Do you remember what time in the day it was you
148 gave it to the chief of police?

A. I gave it to the chief of police immediately after writing it, but the specific hour when I wrote it I could not tell you at this time.

Q. Mr. Heiskell, I will call your attention here to the minutes of the board of mayor & aldermen on Feb'y 13th, 1901, and ask you to state if it is not recited there that Alderman Trigg was present?

A. Yes sir, Alderman Trigg is recited as being present, answering the roll-call.

Q. That was the last regular meeting in February, was it not?

A. That depends on whether that was the third Friday in February. If it was it was the last regular meeting. The board meets on the first and third Fridays of each month.

Q. Then the regular meetings are held on the first and third Fridays in each month?

A. Yes sir.

Q. You were, I believe you stated, an alderman of the city of Knoxville on July 1st, 1882?

A. Yes sir.

Q. The time when the original contract between the city of Knoxville and the Knoxville Water Company was entered into?

A. That is correct.

Q. And you were mayor of the city of Knoxville, on July 27th 1900?

A. Yes sir.

Q. There has been offered here as evidence by the plaintiff a copy of the alleged ordinance of the city of Knoxville passed on July 27th, 1900, the relevancy of which, however, I have excepted to, I will ask you to state if you are the same S. G. Heiskell who signed that ordinance—the one in the paper here?

A. I suppose I am. If the one in the paper is a correct copy of the one passed at the board I am the same man. I never read the one in the paper. I do not know whether it is correct copy or not. I suppose though it is.

149 Q. I will ask you to read to the court your message to the council approving that ordinance?

—. Gentlemen of the board: Having signed the ordinance fixing the rate to be charged by the Knoxville Water Co. and in view of the fact that it affects every man, woman and child in the city of Knoxville, and may lead to litigation, it is proper that there should be stated the reasons which I understand led you to pass and which induced me to approve the ordinance.

As the citizens know great dissatisfaction has prevailed for a long time as to the rates of the water company. The people believe that they are unduly charged for the use of the water and such complaints are common to all classes. The demand is practically unanimous that something be done for relief and the regulation of rates by ordinance is the most direct way to bring this relief about. But it may be said that this ordinance would lead to a lawsuit and that the city must lose the suit. That is true, but the city may also gain the suit, but loose or gain, we will then know, whether the people are compelled for the next twelve years which the contract has yet to run, to submit to whatever rates the water company may choose to put upon them, and while the expense of the suit may be the price we have to pay for this information, it is a price the people are willing to pay whether we gain or lose. The water company claim an unrestricted right to fix rates as it pleases just so it does not exceed the charge of fifty cents per thousand gallons of water.

The courts of other States in the decisions of cases like this held that the question of what is a reasonable rate is to be decided by the consideration of the value of the plant.

If the water company should enjoin this ordinance upon the ground that the rates fixed in it are unreasonably low they would be compelled to show the cost of such value of their plant and their financial condition generally. If this should be done we would then know whether or not the assessment fixed on the plant by the county board of equalization is too low.

150 We know that two out of the five members of that board wanted to make the assessment three hundred thousand, and referred the matter to the county court, which in turn requested the State board of equalization to raise the assessment. The water company in the ordinance consolidating the Lonsdale-Beaumont Water Company with itself, obtained permission to bond its plant for eight hundred thousand dollars. It is supposed that the managers of the company were familiar with the value of the plant, and thought it

would carry eight hundred thousand dollars of bonds when they obtained this permission.

To the average mind, it would appear that a two-hundred-thousand assessment of an eight-hundred-thousand-dollars plant is a very low assessment being only twenty-five per cent.

The average tax-payer of Knoxville pays on from sixty to seventy-five per cent. of his property.

Even if the city should loose the suit it will have been the means of ascertaining how to correctly assess the water company, and the taxes collected from the increased assessment will vastly more than pay the cost of litigation.

The original contract between the mayor & aldermen and the water company was one-sided, and that side was the water company's side.

The interest of the city and citizens appears to have been a minor consideration.

The plant originally established was cheap, inferior and pipes small, and made in many places of rotten iron.

When it is considered that these small pipes, both in the ninth ward and in East Knoxville do not carry water enough to supply an engine in case of fire, it is plainly demonstrated that the welfare of the city was a minor matter in the making of the contract.

The work of construction had not proceeded far, before people could see that there was "something rotten in Denmark" and citizens were thereby amply justified in the opinion that the original contract was begotten in sin and born in *equity*.

151 Its unhappy birth occurred in 1882.

In 1890, Messrs. Wheeler and Parks bought the controlling share of the company stock and against these gentlemen I have not a word to say. They have improved the plant and filtered water. They are reputable business men who I am told stand high in the circle of their acquaintances. I have met Mr. Parks, personally.

They bought the controlling stock as a business investment strictly. They live in Boston and have no interest in Knoxville except what they can make out of the —, by supplying them with water.

They are after Knoxville dollars, and they want the tide of those dollars turned permanently in a generous proportions towards Boston.

Knoxville is a benefit to them only as its inhabitants buy more water. They are not in any degree to be criticised for attempting to make all they can out of their investment. They do not run this company for their health. It is natural for them to hold fast to all they have here, and to attempt to get more, and to contest any interference with what they consider to be their rights. On the other hand the city has rights and these are the rights we propose to enforce by this ordinance. The city has the right to reasonable rates for water, and that is what we are after. We are just as determined to keep Knoxville dollars at home except — amount as is reasonable for water furnished as Messrs. Wheeler & Parks are that our dollars shall go to Boston, in such amount as they choose to demand for water. If Messrs. Wheeler and Parks insist upon the full measure

of what they conceive to be their rights and push forward to make the last dollar out of their plant, it is to be expected that the city will defend what it considers to be its rights, and will object to the claim of an unrestricted right on the part of Messrs. Wheeler & Parks to charge at will for water. I take it that no one will seriously claim that there is any probability of Messrs. Wheeler & Parks making any material reduction in water rates voluntarily.

152 The opportunity to reform some of the harsh features of the original contract presented itself last fall, when the water company, asked additional concessions from the city. It wanted to consolidate the Lonsdale-Beaumont Water Company in West Knoxville with its own and raise the bond limit on its plant from $180,- to $800,000. That was the time for the city to demand in turn concessions from the water company but the consolidating ordinance was signed with great promptness by the then mayor on the very night of its passage.

For the concessions granted by the city in the consolidation ordinance, the water company did not upon its part grant a single concession, or give one iota of relief to the people of Knoxville, and what impresses me as the strangest feature of all is that no concessions and no relief were even demanded on the part of the city.

The result of the whole matter is gentelemen, that if the people got better water rates from the water company it can only be done, as you have done by passing an ordinance regulating rates.

I can see no expectation of hope of relief in any other way. Twelve years is a long time to wait before any relief can be had. There is no reasonable expectation of the water company voluntarily giving lower rates.

If the company chooses to litigate this ordinance that is the way, that is the way and the only way that the matter can be settled, and there is no doubt in my mind but the people of the city will endorse whatever expense you may go to in settling the question, whether or not they have any say so in fixing the rates by them for water.

Mr. TURNER: I object to it because it is irrelevant to the issues in this case.

The COURT: I think if the ordinance is relevant the message would be relevant.

Q. You are a consumer of the Knoxville Water Company, Mr. Heiskell?

A. Yes sir. I pay for one house.

153 Q. You paid your water bill?

A. I did the last time it was rendered—whenever that was.

Q. You did not pay it under protest?

A. I don't remember whether I did or not.

Q. You paid according to the rates charged you by the water company?

A. Yes of course I paid it that way. They will not receive it

any other way. I am not certain whether I paid it under protest or not. I have the receipt.

Q. Alderman Cleage is here as a witness, is he?

A. Yes sir.

S. E. CLEAGE, the next witness, being duly sworn, testified as follows:—

Examined by Mr. TURNER:

Q. Where do you reside?

A. Here in Knoxville.

Q. What connection have you, if any, with the city government of Knoxville?

A. Alderman of sixth ward.

Q. How long have you occupied that office?

A. This is the fourth year.

Q. What is your business, Mr. Cleage?

A. I am at present law agent of the Southern Railway Company.

Q. Where are you engaged in that business.

A. On the North Carolina division. My headquarters principally are in Asheville.

Q. How long have you been in that service?

A. About two and ½ or three years—not all of the time, as law agent. I was fire and stock claim agent up until about two months ago.

Q. You say your headquarters are at Asheville—now where was your territory?

A. Asheville, east to Salisbury; Asheville to Spartanburg, Asheville to Murphy, and from Winston-Salem to Charlotte, called the Norton branch, about 41 miles from Salisbury.

Q. What is the mileage of road over which your jurisdic-
154 tion extends.

A. About 500 miles.

Q. What is the character of work which your duties require of you?

A. The adjustment and settlement of stock claims, fire claims and freight claims.

Q. Is that conducted from your office in Asheville?

A. Most of it I go in person and look after.

Q. Does it require your personal attention over the whole length of the road committed to your charge?

A. Yes.

Q. During the year 1901, say from first of January how much of your time has been occupied with that service?

A. A great deal of it—more than I have had in years or at any other time since I have been claim agent on that division. Since long about the latter part of January or first of February, I have been very much occupied.

Q. Were your duties increased and extended then or was there any particular occassion for this increased demand on your time?

A. Yes I had a little more territory added to me last November, and then we have had a very dry season there along in February and the fires were terrific, and I was busy looking after these matters all the time. Some of them were very large.

Q. How far is it from Knoxville to Asheville?

A. 129 miles.

Q. And how far from here to the extreme limit of your division?

A. 311 miles.

Q. During the entire month of March, 1901, were you closely confined at your duties in the service you have stated?

A. Yes.

Q. Do you remember now where you were engaged on or about March 9th?

A. No I do not remember exactly except from memorandum. I think the night of the 9th ordinance was passed on the first
155 reading. I was at the regular meeting on the 15th I know. No sir, I have no memorandum just where I was that day.

Q. Appealing to your recollection, I will ask you, if you know at what you were engaged at that time and where you were engaged?

A. I do not know upon what part of my territory, but I was busy with claims at that time.

Q. Was it practicable at that time to reach you with notice of a special meeting of the council of the city of Knoxville?

A. I do not know whether I could have been reached or not. A great many times I am out from stations, and they could not get me if they had a message. I get off trains between stations and often stay out there all day and even headquarters don't know where I am.

Q. If you had had notice of that special meeting of March 9th, was it practicable for you to have attended?

A. I do not think it was, or I would have been here.

Q. My question was, if you had had notice of that meeting on March 9th, whether it was practicable under your duties, would it have been practicable for you to have attended that meeting?

A. I do not know as I have no recollection of what I was doing I think it would have been impracticable for me to have done so.

The COURT: I don't think that would be competent.

Q. Where were you on March 30th, 1901?

A. Almost in the extreme end of my territory—that was on Saturday.

Q. In North Carolina?

A. Yes.

Q. Was it practicable at that time to have reached you with notice of that meeting?

A. No sir it was not.

Q. Now if you had had notice of that meeting was it practi-
156 cable for you to have attended it?

A. No sir, under the circumstances it was not.

Q. Your business engagements at that time were such as commanded your attention there, were they?

A. Yes sir.

Q. What length of time would it have required of you by the usual schedules to have reached Knoxville from that point?

A. Well it would have taken most all day, from about nine o'clock in the morning until seven or ten that night to have gotten here in a day—to have gotten here that night.

Q. I call your attention to a copy of the ordinance passed by the city of Knoxville on July 27th, 1900, and published in the Knoxville Sentinel of July 28th, 1900, purporting to regulate water rates in the city of Knoxville, and ask you whether you were a member of the city council at the time that ordinance was considered and passed?

A. Yes on July 27th, 1900.

Q. Did you favor or oppose the passage of that ordinance?

Mr. CATES: I object.

WITNESS: I think I was in favor of it. I was a member of the board. I possibly might have been absent but I favored the reduction in rates.

The COURT: I think that would be incompetent.

Mr. TURNER: I except to your honor's ruling.

Q. Were you present at the regular meeting of March 15, 1901, at which the ordinance now in question was considered at its second reading?

A. Yes I think I was.

Q. Were you favoring or opposing that ordinance regulating water rates passed on its first reading on March 9th on its second reading, March 15th, and on its final reading March 30th 1901?

A. I favored it.

Q. If you had been present at its first reading and at its third reading, on March 9th and 30th respectively, would you have voted for or against the ordinance?

157 A. I would have voted for the ordinance.

Mr. CATES: Now I object.

The COURT: I do not think it would be competent, it is speculative.

Mr. TURNER: They are proposing to attack this ordinance because of Mr. Cleage's absence, and want of notice to him, and I want to show the result would not have been affected by his vote.

The COURT: I hold it incompetent.

Cross-examined by Mr. CATES:

Q. Did you ever read this ordinance passed on March 30th, 1901?

A. I heard it when it was first read.

Q. You were there on the night of March 1st.

A. I was there the first or I think the second reading.

Q. I will ask you to examine this minute book and state if you

were present on either of the meetings at which the ordinance finally passed on March 30th, 1901, was considered?

A. I think I was at one of them. I was not on the 9th.

Q. On what dates did it come up?

A. March 9th, 15th and 30th.

Q. See if you were there March 15th, 1901?

A. It don't say, that is practically the same ordinance with a slight change in it that we voted for before.

Q. So Mr. Cleage you were not present at either of these meetings?

A. I don't remember now. I thought I was at one of them.

Q. Is it not a fact that you never saw the ordinance in its present form until after it was published in the newspaper?

A. There was only a slight change in it. I forget what clause that was. I know what was in it.

Q. Now when the ordinance of July 27th, 1901, was passed, that was before Mr. Caldwell made his report in the litigation between the city of Chattanooga and water company at Chattanooga, was it not?

158 A. I don't know.

Q. Is it not a fact that you told me after this question came up and after this ordinance was passed on March 30th 1901, that you did not vote for it, and that Caldwell's report showed it was too late?

A. No, I never made any such statement as that to you.

Q. Now upon what theory or basis did you reduce these charges set forth in this ordinance?

A. We thought they were too high.

Q. Why?

A. From other record.

Q. From what record?

Mr. TURNER: I object to that as immaterial.

Q. Is it not a fact that you voted for this ordinance in July, 1900, without making any sort of investigation?

A. No sir.

Mr. TURNER: I object to this question.

The COURT: I will let him answer and reserve my ruling.

WITNESS: The ordinance as I understand it is practically the same with a slight exception to the one we passed on 27th July.

Q. Can you tell me why the rate of $6.00 per year is too much for a four-room house?

The COURT: I will say that I think the objection is well taken.

Q. Now can you tell me why the rates prescribed in the charges of the water company were considered too high?

A. Only in comparison with other cities.

Mr. TURNER: I object because it is immaterial.

The COURT: I thought that it had been agreed not to go into that.

Mr. CATES: But he has brought in here an alderman and had him testify that he was in favor of an ordinance which he never voted

for, and that he was in favor of the ordinance reducing rates because the rates were too high, I think I may go into the question.

159 The COURT: I have excluded all of that because I think it is incompetent, and I think it is out of the case. I will state to you anything that he may have said about whether he would have voted for this ordinance—I hold incompetent and exclude it.

Q. Where were you on March 9th?

A. I don't remember as I said awhile ago, exactly, what part of my territory?

Q. Where were you on March 30th?

A. A place called "Gold Hill" east of Salisbury.

Q. Now as to your being here on March 9th, depends upon whether you had notice and what kind of notice.

A. Yes sir, I hardly ever come down here except of Saturdays.

Q. Your home is here?

A. Yes sir.

Q. You were law agent of the Southern railway at the time you were elected?

A. I was claim agent then.

Q. With headquarters at Asheville?

A. Yes when elected last.

Q. And you have been notified of many special meetings and actually attended them have you not Mr. Cleage?

A. When we would me-t there and it was understood we were to have a special meeting, I would know it. I have had no notice sent me.

Q. You have frequently come down here and attended special meetings?

A. Yes sir, I attended three in one week, but I knew it.

Q. You mean you knew it from one meeting to another?

A. Yes sir.

Q. You could not attend a meeting you did not have notice of, could you?

A. No sir.

Q. Had you abandoned your office?

A. No sir.

Q. Had you abandoned the duties of your office?

160 A. No.

Q. Is it a fact Mr. Cleage that there are very few meetings of the council that you have not attended since you have been an alderman?

A. During the last three or four months I have missed considerably.

Q. But you have been in the habit of attending nearly all of the regular meetings?

A. Yes up to about that time.

Q. And you attended such special meetings as you had notice of?

A. Yes sir.

Q. You would come down here on the evening train to be present at the meeting Friday night?

A. Yes sir.

Q. And have come down on the evening train to be present at the special meetings at night?

A. Yes when I could get away. I have come hundreds of miles to be present. From along about February to first of May, I missed some.

Q. When was the next regular meeting after the 30th of March 1901?

A. The first Friday in April.

Q. Look at the minute book here and tell us the day of the next regular meeting.

A. April 5th.

Q. So the next regular meeting was on April 5th?

A. Yes sir.

Q. You attended the regular meeting of March 1st, 1901?

A. Yes I was there.

Q. Now down to and including the month of March how many regular meetings of the council did you attend in the year 1901?

A. The first regular meeting in February; the first regular meeting in March.

161 Q. There was a special meeting on January 7th, 1901, you attended was there not?

A. Yes sir.

Q. Then you were also present at the meeting on Jan'y 18th, 1901,—that was the regular meeting?

A. Yes.

Q. And you were present on Friday, Feb'y 1st, were you not?

A. Yes.

Q. Were there any special meetings if you remember during the month of Feb'y, 1901?

A. I do not remember, I have no record of it.

Q. Your appearance at these called or special meetings of the council depended upon whether you had notice of them?

A. Certainly.

Q. Do you know whether if you had had reasonable notice of the meeting of March 30th, 1901, two or three days' notice, that you could not have arranged to be present that night?

A. I don't think I could.

Q. Now about the night of March 9th, 1901, you don't know where you were?

A. No I don't know where I was but I was in about the same kind of business I was in on 30th March. These were some of the worst times we had about fires. Fires were being set by other people and laid on the railroad company, and I was trying to protect the road.

JOHN E. MCMILLAN, the next witness, being duly sworn, testified:

Examined by Mr. TURNER:

Q. What connection, if any, have you with the city government of Knoxville?

A. I am assistant to the comptroller.

Q. Do you know Alderman Joe M. Trigg?

A. Yes sir.

Q. I show you here his written resignation of his office as alderman, addressed to the board of mayor & aldermen, dated March 15th, 1901, and ask you whether that resignation was writ-

162 ten by Trigg or not?

A. Yes, that was written by him in my presence except as to the date?

Q. Was the date left blank?

A. Yes.

Q. Who filled that in?

A. I did.

Q. At what time was that resignation written by Trigg and left with you?

A. To the best of my recollection Trigg gave that resignation to me about five weeks before it was presented. He left the date out and authorized me when presented to fill it in.

Q. For what purpose was it left with you?

A. No purpose except to hand me the resignation, and remarked that whenever the citizens of the 5th ward got an alderman satisfactory to the citizens of the 5th ward, to present that resignation.

Q. And you held the resignation until meeting of March 15th, 1901?

A. Yes sir.

Q. You filled in the day personally?

A. Yes sir.

Q. What occasioned Trigg's resignation?

A. He was going to leave the city, going to Washington so I was informed, going there to live.

Q. At what time did he leave and go to Washington?

A. The next day after he gave me that resignation.

Q. Has he ever resided in Knoxville since then?

A. No sir.

Q. Was he actually a resident then of Washington on March 9-h, 1901?

A. Yes sir.

Q. Do you know whether Trigg was present in Knoxville at the meeting of the board of mayor & aldermen on Feb'y 15th, 1901?

A. I don't think Trigg was. He told me he was going to the meeting but my recollection is he left that night.

163 Q. What calls it to your mind that night?

A. Because I expected him to go to the council meeting and one of the aldermen told me he was not there, and the next morning some one came into the office and asked if Trigg had any salary due him, he owed a grocery bill, and he said he had went over to his house that morning, Feb'y 16th, and the household goods had been shipped the night before. That is what calls it to my attention that he left that particular night—about February 15th.

Mr. CATES: I object to the statements of the witness as to what somebody told him about Trigg, as hearsay and incompetent.

The COURT: That would not be competent.

Cross-examined by Mr. CATES:

Q. The minute book of the mayor & aldermen of regular meeting on February 15th, 1901,—look at it—and see if it don't recite that Alderman Trigg was present at that meeting.

A. Yes sir.

Q. Were you present?

A. I don't recall. I think I was there just after it adjourned.

Q. Is it not recited at that meeting that Alderman Trigg presented and read a resolution and moved its adoption and a second was made to said motion and the same discussed? Alderman Aiken presented an amendment to Alderman Trigg's resolution, and moved its passage, and on being seconded same carried. The original of Alderman Trigg's resolution as amended by Alderman Aiken was after discussion put to the house and carried.

A. Yes, he must have been there then.

Q. That resignation was signed here in Knoxville?

A. Yes sir, it was written in my presence.

Q. You filled in the date.

A. Yes sir.

Q. Mr. McMillan is — not a fact that he left the night of March 9th for Washington?

A. No sir, I had it for four weeks. I will swear to that positively.

164 An ordinance to regulate the maximum rate to be charged to the consumers of water by any company in the city of Knoxville.

SEC. 1. Be it ordained by the board of mayor & aldermen of the city of Knoxville, That no person or company, firm or corporation furnishing water to the city of Knoxville, or the inhabitants thereof, shall charge a higher maximum rate for water than that set out in the following schedule, to wit:—

Private dwellings—occupied by one family.

Four rooms or less	$4.80
Five room	5.60
Six rooms	6.40
Each additional room	.50
One bath-tub for one family	4.00
Each additional bath-tub	2.50
One water-closet of approved kind for 1 family	4.00
Each additional water-closet	2.50
One self-closing urinal for one family	2.50
For each additional urinal	1.50

Boarding and lodging houses.

Six rooms or less	8.00
Each additional room	.50

One bath-tub	6.50
Each additional bath-tub	4.00
One water-closet	6.50
For each additional water-closet	4.00
One closing urinal	4.00
Each additional urinal	2.25

Hotels.

Meter rates.

Stores, offices, warehouses, & workshops.

For general use not specially rated and requiring not more than ordinary supply of water:

165	1 faucet for 1 tenant	6.50
	Each additional faucet not rated below	2.25

Bakeries.

Per barrel of flour used daily	4.00
No rate less than	6.50

Barber shops.

One faucet, 1 chair	4.00
Each additional faucet	1.50
Each additional chair	1.50
No rate less than	6.50

Baths.

Public, 1 tub	8.00
Each additional tub	4.00

Dental offices.

1 faucet, 1 chair	6.50
Each additional chair	1.50
Each additional faucet	1.50

Druggists and apothecaries.

1 faucet	9.50
Each additional faucet	2.50

Soda fountains.

Meter rates.

Tumbler-washers.

Meter rates.

Public laundries.

Motors, meter rates.

Markets.

1 faucet	$6.50 to 9.50
Each additional faucet	2.25

Printing offices.

Exclusive of water for engine or power	6.50 to 18.00

Photograph galleries..... 9.50 to 37.50
Public bar-rooms..... 8.00 to 18.00

Restaurants and dining saloons.

Without a public bar..... 6.50

166 And 40 cents additional for each chair for table guests.

Steam boilers.

Per horse-power 1.00

Bath-tub, water-closet and urinal for private use connected with a store, office, etc., same rate as for private dwellings, those connected with bar-rooms, restaurants, office buildings saloons, etc., same as for boarding and lodging house rates.

Stables.

Livery and sale stables, meter rates.

Private stables, each horse and cow 1.50

Hose sprinklers and street-washers.

Rates governed by number of lineal feet frontage and include the privilege of washing windows, porches and sidewalks, and sprinkling lawns, also street in front of the taker'-, premises at the following rate per annum for each portion of the year as actually used for all the above purposes.

Dwellings with lawn etc..... ..... 6.50

Fifty feet frontage or less.

Each additional 50 feet..... 3.00

Premises having less than 75 feet shall be rated as of 50 feet, and those having more shall be rated as of 100 feet.

Business houses.

For first 25 feet frontage or less..... 4.50
Each additional 25 feet..... ..... 2.25

Premises having less than 37½ feet shall be rated as 25 feet and those having more as 50 feet.

Fountains.

Use limited to 6 hours only per day for seven months each year.

For a jet of $\frac{1}{16}$th inch..... 5.00
For a jet of $\frac{1}{8}$th inch..... 8.00
For a jet of $\frac{3}{16}$th- inchs..... 12.00
For a jet of $\frac{1}{4}$ inch 25.00
For a jet of $\frac{5}{16}$ths inch 45.00

Or by meter at the discretion of the company or consumer.

Building purposes.

167 Mortar for laying brick per thousand .08
Mortar for laying stone per cubic yard .03
Mortar for plastering per 100 sq. yds. .28
Mortar for other purposes, for each cask of lime or cement used .08
Cement sidewalk, per 100 sq. feet .20

Meter rates.

0 to 50 M gals. monthly per thousand gals. .18
50 to 100 M gals. monthly 16c. per M gals.
100 to 150 M gals. monthly, 12c. per M gals.
150 to 200 M gals. monthly, 8c. per M gals.
200 to 250 M gals. monthly, 7½ per M gals.
250 to 350 M gals. monthly, 6c. per M gals.
350 to 1,000,000 gals. monthly, 5c. per M gals.
Above a million gals. monthly 5c. per 1,000,000 gals.
Provided that the charge at any given rate shall not exceed the maximum charge at the next lower rate, provided that the minimum meter charge shall not be less than $8.00 per annum and meter rent.

Meter rent.

80 cents per annum for each ¾-inch nominal size of meter.

Elevator service.

For amount of water used as registered by the indicator, meter rates are to be charged.

Fire protection.

Automatic sprinkler or hose outlet, used exclusively for fire protection in buildings, for each 1000 sq. ft. of floor space, or fraction thereof, per annum..... $2.25

Provided, that the amount of water rent paid for other purposes on premises having fire-protection fixtures shall be abated to an amount not exceeding the charge for said fire protection as per above. Fire-hydrants, with outlet like or similar to city hydrants, each per annum $45.00
And no reduction or abatement on account of water used for other purposes, at rate provided therefor.

168 SEC. 2. Be it further ordained—That it shall be a good defense to any action brought against any consumer of water in the city of Knoxville, by any person, company, firm or corporation for the use of water, for such consumer to show that he has paid for the water so used by him at the foregoing rates, or tendered the payment of the same before suit was brought, with the tender continuing as required by law in case of tender to date of trial.

SEC. 3. Be it further ordained: That it shall be unlawful for any person, company, firm or corporation, or their officers agents,

servants, or employees supplying water to inhabitants of the city of Knoxville to charge, demand or collect for water so supplied more than the rates hereinbefore set forth in sec. 1 of this ordinance, and it shall also be unlawful for any such person, company, firm or corporation, or their officers agents, servants or employees to cut off or otherwise interfere with the supply or refuse to furnish a supply of water to any consumer for failure to pay for same, provided such consumer tenders in lawful money the charge for such water at the rates aforesaid, and any violation of the provision of this section of this ordinance shall be a misdemeanor, and upon conviction thereof before the recorder, the offender shall be punishable by a fine of not less than ten ($10) dollars nor more than fifty ($50) dollars for each offense.

SEC. 4. All ordinances or parts of ordinances in conflict herewith be and the same are hereby repealed, and this ordinance shall take effect and be enforced from and after its passage, the welfare of the city requiring it.

Approved.

July 27th, 1900.

S. G. HEISKELL, *Mayor.*

STATE OF TENNESSEE, }
City of Knoxville. }

169 I, C. C. Nelson, recorder and treasurer of the city of Knoxville, do hereby certify *that* the foregoing to be a full, complete and perfect copy of the ordinance it purports to give, as the same was past- on third and final reading by the mayor & aldermen of said city, and approved by the mayor July 27th, A. D. 1900, and as the same now appears on the minutes of said board now in my office, and as the same was published in the Knoxville Sentinel, a newspaper published in said city, July 28, A. D. 1900.

Given under my hand at office in said city, October 19, A. D. 1900.

C. C. NELSON,
Recorder & Treasurer.

{Seal Mayor & Aldermen of the City of Knoxville, Tennessee. Founded 1792.}

Endorsed: Water ordinance—copy.

At an adjourned meeting of the mayor & aldermen of the city of Knoxville, Tennessee, held Friday, July 27th, A. D. 1900, immediately after the passage of the ordinance regulating water rates to be charged in said city—the following appears of record on pages 304 & '5 of said minutes and above date July 27, 1900, A. D. in words, following:

"After signing the foregoing ordinance, Mayor Heiskell presentand read an address giving his reasons for signing said ordinance as follows:

"GENTLEMEN OF THE BOARD: Having signed the ordinance fixing the rates to be charged by the Knoxville Water Co. and in view

of the fact that it affects, every man, woman and child in the city, and may lead to litigation, it is proper that there should be stated the reasons which I understand led you to pass and which induced me to approve the ordinance.

As the citizens know, great dissatisfaction has prevailed for a long time as to the rates of the water company. The people be-
170 lieve that they are unduly charged for the use of the water and such complaints are common to all classes. The demand is practically unanimous that something be done for relief and the regulation of rates by ordinance is the most direct way to bring this relief about. But it may be said that this ordinance will lead to a lawsuit and that the city must loose the suit. That is true, but the city may also gain the suit, but loose or gain, we will then know, whether the people are compelled for the next twelve years which the contract has yet to run, to submit to whatever rate the water company may choose to put upon them, and while the expense of the suit may be the price we have to pay for this information it is a price the people are willing to pay whether we gain or loose. The water company claims an unrestricted right to fix rates as it pleases just so it does not exceed the charge of 50 cents per thousand gallon of water.

The courts of other States in the decision of cases like this held that the question of what is a reasonable rate is to be decided by the consideration of the value of the plant.

If the water company should enjoin this ordinance upon the ground that the rates fixed in it are unreasonably low, they would be compelled to show the cost of such value of their plant and their financial condition generally. If this should be done, we would then know whether or not the assessment fixed on the plant by the county board of equalization is too low.

We know that two out of the five members of that board wanted to make an assessment three hundred thousand, and referred the matter to the county court, which in turn requested the State board of equalization to raise the assessment. The water company in the ordinance consolidation the Lonsdale-Beaumont Company with itself, obtained permission to bond its plant for ei-*th* hundred thousand dollars. It is supposed that the managers of the company were familiar with the value of the plant and thought it would carry eight hundred thousand dollars of bonds when they obtained this permission.

171 To the average mind it would appear that a two-hundred-thousand — assessment of an eight-hundred-thousand-dollar plant is a very low assessment being only twenty-five per cent.

The average tax-payer of Knoxville pays on from sixty to seventy-five per cent. of his property.

Even if the city should loose the suit it will have been the means of ascertaining how to correctly assess the water company, and the taxes collected from the increased assessment will vastly more than pay the costs of litigation.

The original contract between the mayor & aldermen and the

water company was one-sided, and that side was the water company's side.

The interests of the city and citizens appears to have been a minor consideration.

The plant originally established was cheap, inferior and the pipes small and made in many places of rotten iron.

When it is considered that these small pipes both in the ninth ward and in East Knoxville, do not carry water enough to supply an engine in case of fire, it is plainly demonstrated that the welfare of the city was a minor matter in the making of the contract.

The work of construction had not proceeded far before people could see that there was "something rotten in Denmark" and citizens were thereby amply justified in the opinion that the original contract was begotten in sin and born in inequity.

Its unhappy birth occurred in 1882. In 1890 Messrs. Wheeler and Parks, bought the controlling share of the company stock, and against these gentlemen I have not a word to say, They have improved the plant and filtered — water, They are reputable business men who I am told stand high in the circle of their acquaintances. I have met Mr. Parks personally.

They bought the controlling stock as a business investment strictly. They live in Boston and have no interest in Knoxville, except what they can make out of them by supplying them with water.

They are after Knoxville dollars, and they want the tide
172 of those dollars turned permanently and in generous proportions towards Boston.

Knoxville is a benefit to them only as its inhabitants buy more water. They are not in any degree to be criticized for attempting to make all they can out of their investment. They do not run this company for their health. It is natural for them to hold fast to all they have here and to attempt to get more, and to contest any interference with what they consider to be their rights. On the other hand the city has rights and these are the rights we propose to enforce by this ordinance. The city has the right to reasonable rates for water, and that is what we are after. We are just as determined to keep Knoxville dollars at home except amount as is reasonable for water furnished as Messrs. Wheeler and Parks are that our dollars shall go to Boston in such amount as they choose to demand for water. If Messrs. Wheeler and Parks insist upon the full measure of what they conceive to be their rights, and push forward to make the last dollar out of their plant, it is to be expected that the city will defend what it considers to be its rights, and will object to the claim of an unrestricted right on the part of Messrs. Wheeler and Parks to charge at will for water. I take it that no one will seriously claim that there is any probability of Messrs. Wheeler & Parks making any material reduction in water rates voluntarily.

The opportunity to reform some of the harsh features of the original contract presented itself last fall when the water company asked additional concessions from the city. It wanted to consolidate the Lonsdale-Beaumont Water Company in West Knoxville with its own and raise the bond limit on its plant from $180,000 to $800,000.

That was the time for the city to demand in turn concessions from the water company but the consolidating ordinance was signed with great promptness by the then mayor on the very night of its passage. For the concessions granted by the city in the consolidating ordinance the water company did not upon its part grant a single
173 concession or give one iota of relief to the people of Knoxville, and what impresses one as the strangest feature of all is that no concession and no relief were even demanded on the part of the city.

The result of the whole matter is gentlemen: that if the people get better water rates from the water company, it can only be done, as you have done by passing an ordinance regulating rates.

I can see no expectation or hope of relief in any other way. Twelve years is a long time to wait before any relief can be had. There is no reasonable expectation of the water company voluntarily giving lower rates.

If the company chooses to litigate this ordinance that is the way *that is the way* and the only way the matter can be settled, and there is no doubt in my mind but the people of the city will endorse whatever expense you may go to in settling the question whether or not they have any say so in fixing the rates paid by them for water."

STATE OF TENNESSEE, }
City of Knoxville. }

I, C. C. Nelson, recorder, &c. of said city, do hereby certify the foregoing to be a full, true and perfect copy of the mayor's address it purports to give, as the same appears of record in my office.

Given under my hand at office in the said city this 7th day of March, 1901.

C. C. NELSON,
Recorder & Treasurer.

{ Mayor & Aldermen of the City of Knoxville, Tennessee. Founded 1792. }

This was all the proof in the cause.

The court then rendered the following special findings of
174 of fact and opinion:

In the Circuit Court at Knoxville, Tenn.

THE MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY. } # 1363.

In compliance with the demand of plaintiff, I submit the following findings of facts:—

First.

The plaintiff The Mayor & Aldermen of the City of Knoxville is a municipal corporation, and the defendant is a private corporation, chartered and organized under the laws of the State of Tennessee, as

shown by defendant's charter, a certified copy of which was offered, and filed in evidence on the trial of this cause and reference is here made to the same.

Second.

On July 1st, 1882, the plaintiff entered into a contract with the defendant, under and by which the plant and works of defendant were built, and in which it was provided among other things, that the defendant company, upon the terms therein provided, should supply the city of Knoxville, and its inhabitants with water for fire protection and public sanitary and domestic purposes, and that the defendant company should supply private consumers with water at a rate not exceeding five (5) cents per 100 gallons, "provided, however, which is expressly understood, that the entire cost of introducing water from the mains into private residences, including cost of meter, when used, should be borne by the parties introducing or ordering the same;" a certified copy of this contract is filed as Exhibit "A" to the defendant's plea in this cause, and reference is here made to the same, for its full terms and provisions.

Third.

At the time the contract of July 1st, 1882, was entered into
175 between plaintiff and defendant, the city of Knoxville comprised only the first nine wards of the city as it now exists.

On February 9th, 1888, as shown by the certified copy of the minutes of the city council offered in evidence by the defendant, the contract of July 1, 1882, was by agreement modified so as to reduce the amount to be paid by plaintiff to defendant for hydrant rentals.

Fourth.

On the 18th day of April, 1891, the town of North Knoxville which is now the 11th ward of the city of Knoxville, by consolidation under the act of 1897, entered into a contract with Wheeler & Parks, under and by which water works were built and established in said town of North Knoxville, and under and by transfer, dated on the — day of November, 1894, the defendant became the owner of all the rights of Wheeler and Parks under their contract with said town of North Knoxville and said contract and said assignments were offered in evidence by the defendant on the trial in this cause, and reference is here made to the same.

Fifth.

On the 29th day of July, 1891, the Lonsdale-Beaumont Water Company was duly chartered and organized under the laws of the State of Tennessee, as shown by defendant's charter, offered in evidence in this cause, for the purpose of supplying the town of West Knoxville, and its inhabitants with water, and on the 17th day of Sept. 1892, said Lonsdale-Beaumont Water Co. and said town of West Knoxville entered into a contract providing for a supply of water to said town and its inhabitants upon stipulated prices,

and these prices are specifically set forth in said contract, which was offered as evidence in this cause, and reference is here made to the same. The town of West Knoxville is now the 10th ward of the city of Knoxville, On the 20th day of October, 1899, the plaintiff passed an ordinance giving permission to said Lonsadle-Beaumont Water Company, and the Knoxville Water Company to consolidate, but in said
176 ordinance it was provided that the option, which the plaintiff in the contract of July 1, 1882, reserved to itself to purchase the plant of the Knoxville Water — was extended to and made to cover the whole plant of the consolidated companies, and it was further provided that the consolidated company should continue to furnish to people living in the 10th ward of the city of Knoxville, being the territory formerly known as the town of West Knoxville, water at a maximum rate not exceeding that fixed in the above-mentioned ordinance and contract of Sept. 17th, 1892, between the town council of West Knoxville, and the Lonsdale-Beaumont Water Company, and further that said consolidated companies should furnish water to people living in the remaining wards of the city of Knoxville or who may hereafter come to live in said remaining wards, water at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the city of Knoxville, dated July 1st, 1882, and the schedule of rates and charges then in froce and operation by the defendant Knoxville Water Company, and it was further provided that within thirty days after said ordinance should go into effect that the Lonsdale-Beaumont Water Company and the Knoxville Water Company should file their written acceptance of said ordinance in so far as it altered or change- said contract- of Sept. 17th 1892 and July 1st, 1882, and that thereupon said ordinance should be and become a part of each of said contracts, and in as full a manner as if the provisions of said ordinance were embraced in formal written contracts made and executed between plaintiff and said water companies; for the full terms and provisions of said ordinance, reference is hereby made to the same which is filed in this cause as Exhibit "B" to defendant's pleas herein. On the same date, to wit: on October 20th, 1899, both the Lonsdale-Beaumont Water Company and the Knoxville Water Company by their proper officers filed their written acceptance of said ordinance of Oct. 20 1899 and thereupon said ordinance became a part of said contracts of July 1 1882 and Sept. 17, 1892.

Sixth.

The rates in force and operation by the Knoxville Water
177 Company on the 20 day of Oct., 1899 were as set out in a pamphlet offered in evidence in this cause by defendant, and were published by the defendant company on April 1, 1895.

Seventh.

On May 18, 1895, plaintiff passed an ordinance regulating meter ates to be charged by defendant company but this ordinance was

in fact only adopting the meter rates then in force by defendant company and made some provision in regard to requiring the defendant company to furnish meters to consumers but in so far as the proof in this cause discloses the court is unable to say whether the meter rates were subsequently changed in pursuance of the ordinance or in pursuance of the previous rates adopted by defendant inasmuch as they were one and the same.

Eighth.

After the passage of the ordinance of October 20, 1899, and its acceptance by the Lonsdale Beaumont Water Company and the Knoxville Water Company, these two companies were duly consolidated by a transfer of all the property including the aforesaid contract of Sept. 17th, 1892 of the Lonsdale-Beaumont Water Company to the Knoxville Water Company, and the articles of consolidation or the deed of transfer was duly filed and recorded in the office of the secretary of state.

Ninth.

On March 30, 1901, the plaintiff attempted to pass an ordinance reducing the rates and charges to be made by the defendant company, and on April 30, 1901, by a warrant issued by the recorder of the city of Knoxville, this proceedings was commenced by plaintiff against the defendant company to recover a penalty "of not less than ten dollars nor more than fifty dollars" alleging a violation of said ordinance of March 30, 1901, by "charging collecting and demanding unlawfully of W. K. McClure for water furnished and to be furnished him by said Knoxville Water Company in the city of Knoxville, more than the rates fixed by said ordinance of March 30, 1901."

178 That the provisions of said ordinance of March 30, 1901, upon which said ordinance is based is as follows:

"That it shall be unlawful for any person, company, firm, or corporation or their officers, agents, servants or employees supplying water to inhabitants of the city of Knoxville to charge, demand or collect for water so supplied more than the rates hereinbefore set forth in sec. 1 of this ordinance—and it shall also be unlawful for any such person, company, firm or corporation or their officers, agents, servants or employees to cut off or otherwise interfere with the supply or refuse to furnish a supply of water to any consumer for failure to pay for same, provided such consumer tenders in lawful money the charge for such water at the rates aforesaid, and any violation of the provisions of this section shall be a misdemeanor and upon conviction thereof before the recorder, the offender shall be punishable by a fine of nor less than ten — ($10.00) not more than fifty dollars ($50.00) for each offense."

I find that the water for which the charge was made was furnished to tenants living in the property owned by J. S. Grantz—for whom W. K. McClure was agent, and as such agent he represented the owner Gratz in renting the property that the bills were rendered to W. K. McClure as agent and paid by him in that ca-

pacity, but actually paid by the owner J. S. Gratz, who lived in the city of Chicago State of Illinois; that the bills rendered to said W. K. McClure and paid as aforesaid were in accordance with the rates prescribed by the ordinance of Oct. 20—1899 and in excess of the rates prescribed in the first section of the ordinance of March 30, 1901.

Tenth.

In regard to the passage at special meetings. I find the following to be the facts:

The regular meetings of the board of mayor & aldermen of the city of Knoxville are on the first and third Fridays of each month, but under the charter of the city of Knoxville, the mayor has power to call special meetings of the board of aldermen. The ordinance upon which this suit is based was passed on its first reading
179 on March 9th, at a special meeting of the council; on its second reading on March 15th at a regular meeting of the council; and on its third reading on Saturday March 30th, at a special meeting of the council, and it was published on Sunday, March 31st, in the Knoxville Journal and Tribune, a daily newspaper published in the city of Knoxville, that newspapers in Knoxville, Tennessee, have been issuing regularly since 1866 Sunday editions or issues, that these Sunday editions are as large if not larger than any editions during week days.

The said meeting of March 30th, 1901, was in pursuance of a call of that date purporting to be signed by the mayor of the city of Knoxville, S. G. Heiskell, but in fact the name of the mayor in said call was signed by J. J. Atkins, chief of police of the city of Knoxville, who was instructed so to do by the mayor, but the mayor did not in fact see this call until it was read at the meeting of the council. The special meeting of March 9th, 1901 was held in pursuance to a written call of same date signed by the mayor, which, however, does not state the place of meeting. No notice of the meeting of March 9th, 1901 was given to Alderman Cleage, Trigg and Aiken, but Alderman Aiken attended the meeting, and no notice was given Alderman Cleage of the meeting of March 30th, 1901; in regard to Alderman Trigg it was not necessary for him to have notice because he had tendered his resignation to John E. McMillan, deputy comptroller of the city of Knoxville, from four to six weeks prior to the time it is dated on March 15-h, 1901, when it was accepted by the council, and Alderman Kephart elected in his stead, and for some time previous to the meeting of March 9th, 1901, said Trigg had abandoned and vacated his office by removing from the city of Knoxville to the city of Washington in the District of Columbia, changing his residence and moving his family there, and was not entitled to notice. Alderman S. E. Cleage who represented the 6th ward of the city of Knoxville, was an active alderman in the discharge of his duties, and had neither abandoned his office nor resigned the same. At the time
180 of his election as an alderman of the city of Knoxville, and on March 9th, 1901 and March 30th, 1901, he was in the

employ of the Southern R'y Co. as law agent with his headquarters at Asheville, in the State of North Carolina, and transacted his business principally in the States of North and South Carolina, and outside the limits of the State, his territory including about 500 miles of railroad. That his duties required him to go in person over his territory investigating, report and adjusting claims for damages against said R. R. Co. That during the months of Feb'y March and April he was more than usually busy in the discharge of his duties, but retained his home in the 6th ward of the city of Knoxville and was active in the discharge of his duties as an alderman; that he attended nearly all of the regular meetings of the council and nearly all of the special meetings of which he had notice; that it was impracticable for him to have been present on March 30th, 1901, at the special meeting on that date, but it was not impracticable to have given him notice of that meeting; that it was not impracticable to have given him notice of the special meeting on March 9th, 1901, but it does not appear that it was impracticable for him to have attended that meeting; that there was no emergency for this ordinance to be considered at special meetings of March 9—1901 and March 30—1901. It was the duty of the municipal authorities to inform Al-erman Cleage of the special meetings of March 9th and March 30th, and as a public servant and official, he had a right to have notice of these meetings, but notice was not given him, and therefore this ordinance of March 30—1901 is invalid.

Eleventh.

The opinion of the witness Cleage as to what might have been practicable as to notice to him, and his ability to attend the special meetings over the objection of defendant, the court holds incompetent and irrelevant as well as his statement of how he would have voted had he been present or how he had previously voted on similar ordinances.

181 Twelfth.

I find that the ordinance of October 20th, 1899 was accepted by both the Lonsdale-Beaumont Water Company and the Knoxville Water Company, and by virtue of said acceptance became parts of the contracts of Sept. 17th, 1892 and July 1 1882, hereinbefore referred to, and that the consolidated Knoxville Water Company has been up to the present time complying with its contracts and the rates fixed by said ordinance and contract of Oct. 20, 1899, and the charges rendered to W. K. McClure agent, as hereinbefore set forth, were in accordance with the rates prescribed by said ordinance, and contract of Oct. 20, 1899; (but in my opinion the board of mayor & aldermen of the city of Knoxville, is vested with the right to regulate and change the rates prescribed by the ordinance and contract of October 20, 1900, and if the ordinance of March 30, 1901, had been regularly passed, the same would have been operative to reduce he rates prescribed by the ordinance and contract of Oct. 20, 1900.)

Thirteenth.

I find that the difference in the rates prescribed by the ordinance of March 30th, 1901, and the charges actually made to W. K. McClure, and collected off of J. S. Gratz, owner, as hereinbefore set forth, is the sum of $1.15 for the three premises mentioned in the testimony of W. K. McClure, that is fifty cents, forty-two cents and twenty-three cents, respectively; W. K. McClure lives in the 10th ward of the city of Knoxville, formerly West Knoxville, and his personal bill was paid under the Lonsdale-Beaumont contract, and was less that he would have had to pay under the ordinance of March 30, 1901.

Fourteenth.

I find that the water furnished to J. S. Gratz, was furnished under a contract as follows:

"Knoxville Water Company, service # 2850.

KNOXVILLE, TENN., *Sept.* 17, 1896.

The undersigned hereby applied to the Knoxville Water Company for a supply of water at premises No. 706 High street,
182 owned by J. S. Gratz, occupied by tenants, to be used for domestic purposes only, and I hereby agree to use and pay for the same in accordance with the rates, rules and regulations of the Knoxville Water Campany as now or hereafter in force, and which are made part of this contract, and I further agree that the said company may enter upon any lands owned by me, or in which I may have such right, and place therein upon the terms provided therefor, all pipes, that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require."

Which contract was signed by J. S. Gratz by his agent, W. K. McClure.

I find that the defendant has about four thousand (4000) customers, or patrons with whom it has contracts similar to the Gratz contract, set out above, to whom defendant is furnishing water under the rates in force on October 20, 1899, and that it is furnishing water to the city of Knoxville for other than hydrant purposes at the rates prescribed in said contract of October 20, 1890.

JOSEPH W. SNEED, *Judge.*

Filed Aug*f.* 9, 1901.

R. A. BROWN, *Clerk.*

The plaintiff then moved the court for a new trial, which motion was overruled.

To the action of the court in overruling its motion for a new trial and rendering judgment against the plaintiff, the plaintiff excepts and tenders, this, its bill of exceptions, which is signed and sealed by the court, and made a part of the record.

This August 9, 1901.

JOSEPH W. SNEED, *Judge.*

183 STATE OF TENNESSEE:

Circuit Court at Knoxville.

We, the Board of Mayor & Aldermen of the City of Knoxville, & —— —— acknowledge ourselves indebted to the Knoxville Water Company, in the penal sum of two hundred and fifty dollars for the payment of which we bind ourselves, our heirs and personal representatives, jointly and severally by these presents, but to be void if the said Board of Mayor & Aldermen of Knoxville, shall effectually prosecute its appeal taken to the supreme court of Tennessee, to be held at the court-house in Knoxville, on the second Monday of September, next, from a judgment rendered against it in the circuit court at Knoxville, on the 9th day of Aug., 1901, in the case of "The M. & A. of the City of Knoxville *vs.* The Knoxville Water Company" in said court, or failing therein, shall pay the amount adjudged against it with interest and judgment, and also satisfy the judgment that may be rendered against it by the supreme court in the premises.

Witness our hands and seals the 9th day of Aug. 1901.

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE,
By S. G. HEISKELL, *Mayor.*
S. G. HEISKELL, *Sec'y.*

Endorsed: No. —. Appeal bond. M. & A. of Knoxville *vs.* Knoxville Water Co. Filed 9th day of Aug. 1901. R. A. Brown, clerk.

Bill of Costs.

State tax	$2.50
County tax	2.25
Clerk R. A. Brown. Fil'g recorder's papers, 75c.; 2 orders 50c. motion 25c. judgment final 75c.; subpœnas for six witnesses, 60c.; docketing 30c.; taxing cost 50c.; *subpœna duces tecum* 25c	3.90
Sheriff J. W. Fox, summoning 7 witnesses	1.75
Witnesses: Sam Cleage 1 da. $1.50 292 mi. @ 5c	16.10
	$26.50

184

Clerk R. A. Brown:

This transcript 7360*0* words, at 10c. per 100 $73.60; order of appeal and bond 75c.; certificate and seal 50; $74.85.

Judgment *vs.* plaintiff for costs Aug. 9, 1901.

Endorsed: R. D. No. 1363. *Fi. fa.* Circuit court, Knox county. M. & A. *vs.* K. Water Co. Execution.

Certificate.

I, R. A. Brown, clerk of the circuit court of Knox county hereby certify that the foregoing is a full, true and perfect copy of the rec-

ord and bill of costs remaining in my office in the case of Mayor & Aldermen of City of Knoxville *vs.* The Knoxville Water Co.

Given under my hand and seal of office, this 9th day of Aug., 1901.

R. A. BROWN, *Clerk.*

[Seal Circuit Court, Knox County.]

185 Filed Oct. 2, 1901.

J. G. STUART, *D. C.*

In the Supreme Court, at Knoxville, Tennessee, September Term, 1901.

MAYOR & ALDERMEN OF KNOXVILLE *vs.* KNOXVILLE WATER COMPANY. } Law Cause No. 24. Knox County.

Assignment of Errors for Plaintiff.

Statement of the case.

This is a suit begun by warrant before the recorder, and carried thence by appeal to the circuit court, to recover of the defendant a penalty for violating an ordinance of the city of Knoxville.

The warrant charges the defendant with unlawfully charging, demanding and collecting of W. K. McClure for water furnished, and to be furnished him by it in the city of Knoxville, more than the rates fixed therefor by ordinance of said city approved, March 30th, 1901.

Trans. pp. 1–2.

The recorder gave judgment against the defendant, and the defendant appealed to the circuit court.

Tr. p. 3.

There the defendant made a motion to quash the warrant for insufficiency of its allegations, which motion was overruled.

Trans. p. 28.

In the circuit court, the defendant filed a number of pleas in writing: 1st. Not guilty. 2nd. That the ordinance in question violates the U. S. Constitution, in that it impairs the obligation of certain contracts between the plaintiff and the defendant for the supply of water, etc. 3rd. That said ordinance is oppressive and unreasonable, in that by said contracts plaintiff has an option to buy the defendant's plant, at an appraised value, and this ordinance tends to depreciate its value; that it arbitrarily reduces
186 rates fixed by said contracts; that it prevents defendant from contracting rates with its consumers, and that it will operate to deprive defendant of its property, without due process of law.

4th. That said ordinance interferes with contracts already made between defendant and its consumers for water at contract rates.

5th. That the penalty prescribed by the ordinance is excessive.
6th. *Nil debit.* On these pleas the plaintiff took issue.
Trans. pp. 3–7.

The defendant is a domestic corporation, charter- in 1882 under Act- of 1877, chap. 104, for the purpose of supplying water to the city of Knoxville, and its inhabitants.
Trans. pp. 83–93.

On July 1, 1882, it entered into a contract with the city of Knoxville, to erect water works and supply it with water for a period of thirty years, stipulating the rates at which it should supply the city with water for fire protection and other purposes, and providing by its seventh section: "Said company will supply private consumers with water at a rate not to exceed five cents per one hundred gallons."
Trans. pp. 8 20. 10.

It also gave the city after 15 years, an option to buy the plant, at an appraised value.
Trans. p. 15.

What authority the mayor & recorder had for executing this agreement does not appear in this record.
Trans. p. 18.

Subsequently on April 18, 1891, Wheeler and Parks entered into a contract with North Knoxville to supply said town and its inhabitants with water, and by section nine, it was provided: Water to be furnished private consumers shall be charged for at not exceeding the rates maintained in a certain schedule of rates therein set out.
Trans. 119–122.
187 Trans. pp. 116–128.

This contract on Nov. 7, 1893 was assigned by Wheeler and Parks to the defendant.
Trans. pp. 129–132.

And the territory of North Knoxville was afterwards, in 1897 incorporated into the city of Knoxville, under Act- 1897, ch. 323.
In 1891, the Lonsdale Beaumont Water Co., was chartered under the Acts of 1877, ch. 104, and 1885, ch. 115, for the purpose of supplying water to West Knoxville.
Trans. pp. 94–101.

On Sept. 17, 1892, it entered into a contract with the town of West Knoxville to erect water works, and to supply said town and its inhabitants with water.
Trans. pp. 102, 115.

By section 11, it was provided, that "the grantees shall not charge consumers duting the continuance of the franchise granted by this

ordinance, exceeding the following maximum annual rates," etc., and then sets out a schedule of rates.

Trans. pp. 110–112.

Subsequently West Knoxville, (1897) was consolidated with and became incorporated in the city of Knoxville.

On Oct. 20, 1899, the city of Knoxville passed an ordinance consenting to the consolidation of the defendant and the Lonsdale-Beaumont Water Co., and making certain changes in its contract of July 1, 1882, with the defendant.

Trans. pp. 20–26.

By section 3 it was provided that the defendant should supply the inhabitants of the old territory of West Knoxville, with water at a *am*ximum rate not exceeding that fixed by the contract of Sept. 17, 1892, between the Lonsdale-Beaumont Water Co., and West Knoxville, and by section 4, that it should supply water to *its* inhabitants of the rest of the city at a maximum rate not exceeding that fixed
by the contract between the plaintiff, and the defendant of
188 July 1, 1882, and the schedule of rates and charges now in force and operation by the defendant company.

Trans. 21–22.

The defendant accepted the ordinance.

Trans. pp. 24–25.

And on Jan'y 1, 1901, the Lonsdale Beaumont Water Co. conveyed the defendant all its property, franchises, contracts etc.

Trans. pp. 133–138.

A schedule of the rates and charges in force on Oct. 20, 1899, is shown.

Trans. pp. 145.

On May 17, 1896, the city passed an ordinance regulating the supply of water, and the rates and charges therefor, to private consumers, which rates are scheduled in the schedule last above mentioned.

Trans. pp. 73. 80–82. 140, 143. (p. 5.)

On July 27, 1900, the city passed another ordinance regulating water rates, and repealed all former ordinances in conflict therewith.

Trans. pp. 73. 174–179.

Then on March 30th, 1901, the ordinance in question was passed in amendment of or in lieu of, said ordinance of July 27, 1900, but in substantially the same terms, regulating and fixing the rates to be charged consumers of water.

Trans. pp. 30–37. 65–71.

Sec. 1 provides that, "no person, firm or corporation furnishing water to the city of Knoxville, or the inhabitants thereof, shall charge a higher maximum rate per annum or by meter for water,

than that set out in the following schedule" and then sets out a schedule of rates.

Sec. 3 declares it unlawful for any person, company, firm or corporation supplying water to the inhabitants of the city of Knoxville to charge, demand or collect for water so supplied more than the rates set forth in sec. 1. and that any violation of the ordinance shall be a misdemeanor, for which the offender on conviction, shall be punished by fine of not less than ten nor more than fifty
189 dollars for each offense.

Trans. pp. 30, 36, 66, 70.

By sec. 4 it is provided that it shall take effect from and after its passage.

Trans. p-. 36–71.

This ordinance was finally passed and approved on March 30, 1901, and under the direction of the city authorities, it was published in the Journal and Tribune, a daily morning paper published in Knoxville, in its issue of Sunday, March 31, 1901.

Trans. pp. 37, 59, 151.

On the trial the defendant objected to the introduction of this ordinance in evidence, because it was published on Sunday, therefore not legally published, and without legal publication was invalid.

The court admitted it subject to the exception, and afterwards overruled the exception.

Trans. pp. 37, 59–60.

The proof shows that the defendant violated this ordinance by charging, demanding and collecting on April 9, 1901, of W. K. McClure, for water furnished and to be furnished to three houses mentioned in the proof from April 1, to June 30, 1901, amounts in excess of the rates fixed by this ordinance. These several houses belonged to one J. S. Gratz of Chicago, were managed, controlled, rented, etc., by W. K. McClure, as his agent, and were occupied by tenants. The application to the defendant for water was made by W. K. McClure, in writing on blanks of the defendant company, signed by him, "J. S. Gratz, owner, by W. K. McClure, applicant."

Bills for this water were rendered to W. K. McClure, and in his name, and paid by him to defendant. The accounts so paid were charged by McClure to Gratz and finally settled by him.

Trans. pp. 38–44, 142–'3.

No exception was made to this evidence for any supposed variances between it and the allegations of the warrant.

Trans. pp. 38–44.

190 The case was tried by the court without a jury. The plaintiff demanded a written finding of law and fact.

Tr. p. 28.

The court made such a written finding. Tr. pp. 185–194. He was of opinion that the plaintiff had the right and power to pass the ordinance in question, but that because said ordinance was passed

on its first and third readings at special meetings of the city council, without notice to one of the aldermen it was void, and therefore notwithstanding the defendant's violation of it, the plaintiff could not enforce the penalties.

Trans. pp. 189–193.

Accordingly he dismissed the plaintiff's suit and the plaintiff has appealed to this court.

Trans. pp. 29, 195.

The facts as to the special meeting of the council at which said ordinance was passed, are these:

In passing the ordinance of July 27, 1900, fixing water rates, the words, "per annum" had been omitted from the schedule defining the rates. This had just been discovered and it was necessary to remedy the defect.

Trans. pp. 82–'3, 174.

By the rules and regulations of the defendant, "All bills due the company are payable at its office, those for regular water rates, quarterly, and in advance, on the first days of January, April, July and October, all other bills for water, labor and materials at the time of their contraction."

Rule 14, page 11 of pamphlet, Tr. p. 145.

It was important to put this amendment into effect before April 1, in order to meet and regulate the payments for the next quarter, beginning on that date. The regular meetings of the council were on the 1st and 3rd Fridays of each month—on March 1st and 15th. The charter of Knoxville requires that all ordinances be passed on three readings, each at separate meetings. Therefore to put this amended ordinance into effect by April 1st, it was necessary to pass it on two readings at special meetings.

191 Trans. pp. 156.

It was accordingly passed on its first and third readings, at special meetings, called on March 9, and March 30th, and on its second reading at the regular meeting on March 15th.

Trans. pp. 61–71.

Of the special meeting of March 9, 1901, all the aldermen had notice, except three, Aiken, Trigg and Cleage. All were present except Trigg and Cleage. Aiken was present, and Trigg had previously removed from the city and State, tendered his resignation, and vacated his office.

Of the special meeting of March 30, 1901, all the aldermen had notice and were present except Cleage, and Cleage at the date of both meetings was out of the city and State.

Trans. pp. 47–81. 146–'9.

Cleage was claim agent for the Southern Railway Company, with headquarters at Asheville, N. C. assigned to duty on 500 miles of road, in the States of N. C. and S. C. His duties required his per-

sonal attention at all points in his territory, where claims for damages arose against his road, to investigate report and settle such claims. During February and March, 1901, he was unusually busy, had many claims for damages from fires over various parts of his territory, and was going constantly. On March 9th and 30th, and in fact during all of that month, he was engaged in his work somewhere in his territory, out of the State. It was impracticable to have reached him with personal notice of those meetings, and if he had had notice thereof it was impracticable for him to have attended. He was in favor of the ordinance, and had he been present would have voted for it, but the court on exception of the defendant, excluded the evidence of this fact.

Trans. pp. 161–171.

The ordinance passed all its readings by unanimous vote, of all aldermen present, there being more than a quorum present at each meeting.

Trans. pp. 62–63, 63–'4, 65.

192 In calling special meetings of the council it had long been the custom and practice to summon all aldermen who were to be found in the city, and not to notify those who were at the time out of the city. All the aldermen knew of this custom and practice. The court, however, on exception of the defendant excluded evidence of these facts.

Trans. pp. 72–'3, 149.

Assignment of Errors.

The plaintiff now comes by attorneys and assigns errors as follows:—

I.

The court erred in holding that the plaintiff was bound to give Alderman Cleage notice of the special meetings of March 9, and March 30, 1901, at which the ordinance in question was passed on its first and third readings, and for its failure to give such notice, said ordinance is void.

Trans. p. 192.

Said Cleage was out of the city and State, and not within summoning distance, and no personal notice to him of said meetings was practicable, and therefore the action of the council, without notice to him, was not thereby invalidated.

1 Dillon's Mun. Corp., § 262. 285–'6.
1 Beach Pub. Corp. § 271.
15 Encl. Law, (1st ed.) pp. 1034–'5.
1 Thompson on Corporations, § 596, § 1119, note 3.
State *vs.* Kirk, 46 Conn. 395.
15 Encl. Law, p. 1031, (1st ed.)
2 Cook on Corp. § 600.
5 Thomp. — Corp. § 6175, 6479 and note 2.
3 Thomp. on Corp. § 3936.
Clark on Corporations, p. 491.

II.

The court erred in dismissing plaintiff's suit, and taxing it with the costs. He should have given judgment against the
193 defendant. The plaintiff had the right and authority to regulate the rates to be charged by the defendant. The defendant violated the ordinance fixing those rates, and should suffer the penalty therefor.

Act- 1877, ch. 104, sec. 2.
Munn *vs.* Warehouses, 94 U. S. 133;
Turnpike Co. *vs.* Croxton, 33 L. R. A. 177;
R. R. Commission case, 116 U. S., 307, 347, 352;
San Diego Water Co. *vs.* San Diego, 62 Am. St. Rep., 261, and note at page 289.
Danville *vs.* Danville Water Co. 69 Am. St. Rep. 504
Rogers Park Water Co. *vs.* Fergus, 69 Am. St. Rep. 315,
Huron Water Co. *vs.* Huron, 30 L. R. A. 848;
Ogden Water Co. *vs.* Ogden City, 41 L. R. A. 305.
Griffin *vs.* Goldsboro Water Co. 41 L. R. A. 240;
Rogers Park Water Co. *vs.* Fergus, 21 Sup. Ct. Rep. 490.
Danville *vs.* Danville Water Co., 21 Sup. Ct. Rep. 493.
Freeport Water Co. *vs.* Freeport, 21 Sup. Ct. Rep. 505.
Crumbly *vs.* Water Co. 15 Pickle, 420;

III.

The court erred in his written findings (Tr. pp. 185–'94) and in his rulings on evidence, in the following particulars:

1. He should have made his findings of fact separate and distinct from his findings of law. He confused them throughout.

2 Thomp. on Trials, § 2658;
8 Encl. Pl. & Pr. p. 939.

2. In regard to the written order, application or contract under which defendant furnished the water to W. K. McClure, involved in this case, he erroneously found "which contract was signed by J. S. Gratz, by his agent W. K. McClure," instead of finding and setting out the true and exact signature to said contracts, to wit:

"J. S. GRATZ, *Owner*,
"By W. K. McCLURE, *Applicant.*"

194 He finds and sets out the whole contract, except the signature, and then undertakes to state the effect of the signature, instead of the fact, and mistakes its effect. There is no controversy as to this fact. The evidence is all one way.

Trans. pp. 40, 41, 193–'4.

3. He erroneously found that the defendant furnished the water in question in this case to J. S. Gratz, and failed to find that the water was furnished to W. K. McClure, on his written applications, shown in the record, that the bills were rendered to McClure, individually, payment demanded of him by the defendant: and that de-

fendant collected said bills off of McClure, individually, that McClure paid said bills out of his own funds, and then charged up the amounts to Gratz. There is no evidence to support his finding, and all the evidence supports the contention above made, which the court fails to find.

Trans. pp. 189–'90. 193. 38–44.

4. He erroneously finds that there was no emergency authorizing the passage of the ordinance in question at special meetings, of the city council—without finding the facts upon which he bases such a legal conclusion. The facts are as shown herein, *ante*, pp. 6–7 but the court failed to find these facts.

5. He failed to find the custom and practice as to giving notice of special meetings of the city council in Knoxville.

See *ante* page 8.

6. He erroneously excluded on defendant's exception the evidence of such custom and practice. It is competent and should have been admitted.

Trans. pp. 72–'3.

Angel and Anes on Corporation-, pp. 455–'6.

7. He erroneously excluded on defendant's objection evidence of Alderman Cleage as to the fact that he favored the ordinance in question, and would have voted with the majority for its passage had he been present at the meetings of the council consider-
195 ing the same. This was material and competent on the question as to whether want of notice to Cleage of said special meetings would affect the validity of said ordinance. The rule requiring such notice is for the purpose of giving the minority a chance to be heard. But it cannot be applied in favor of one of the majority, for the reason that his presence or absence would not change or affect the result.

Trans. pp. 165–'6. 192.

8. He failed to find the fact that Alderman Cleage favored and would have voted for the passage of the ordinance in question had he been present at the meetings of the council considering the same. He should have so found, so that this court could have passed upon the legal question, as to the effect of that fact.

9. He erroneously excluded, on exceptions of the defendant, the evidence of Alderman Cleage to the effect that it was impracticable to have given him personal notice of the special meetings of March 9, and March 30, 1901, and that it was impracticable for him to have attended those meetings, if he had been so notified. This was most material evidence, altogether relevant to the issue as to whether the plaintiff was excusable for not giving him notice of those meetings. The mere fact that the witness was not positive as to the meeting of March 9, does not justify the exclusion of his evidence on that subject. It should have been admitted and weighed for what it was worth.

Trans. pp. 192, 164.

10. He erroneously found that it was practicable to have given Cleage notice of the special meeting of March 9 and March 30, 1901, and that it does not appear to have been impracticable for him to have attended the meeting of March 9th. There was no evidence to support this finding. It was contrary to all the evidence on the subject. Cleage was beyond the limits of the city and State, his exact whereabouts were unknown to the officials of the city,
196 and the facts and circumstances shown by Cleage, as well as his direct testimony to the fact, all show to the contrary of the court's finding on this question.

Trans. pp. 192–161–171. 148–'49. 150. 52, 57, 58. 60–61.

11. He erroneously found that Cleage, "transacted his business *principally* in the State of N. C. and S. C. and outside the limits of the State," when there is no evidence to sustain his qualification by the word "principally." All the evidence shows that his duties were limited to N. C. and S. C. entirely outside the limits of this State.

Trans. pp. 191. 161–171.

12. He erroneously excluded on exception of the defendant, evidence to the effect that the Sunday issues of the Knoxville daily papers were the largest and most important, had the largest sale, and circulation in the city and were the best advertising medium of any issue of the week.

Trans. pp. 150–'52.

13. He erred in finding only that the Sunday issues of said papers were as large, if not larger, and had a circulation in Knoxville, as large if not larger, than any other issue of the week, when all the evidence on the subject was to the effect stated in the last foregoing assignment, and he should have so found the facts.

Trans. pp. 150–'52. 19–.

14th. The court erred in overruling the plaintiff's motion for a new trial, and in not making a full and accurate findings of facts.

Trans. p. 29, p. 195.

For the errors aforesaid the judgment of the circuit court should be reversed, and a judgment entered here for the plaintiff.

REUBEN L. CATES, *City Att'y.*
PICKLE & TURNER, *Att'ys.*

197 Filed Oct. 8, 1901.

ALEX. McMILLAN, *Clerk.*

In the Supreme Court at Knoxville, Tennessee, September Term, 1901.

MAYOR & ALDERMEN OF THE CITY OF KNOXville, Plaintiff,
vs.
KNOXVILLE WATER COMPANY, Defendant.
} Law Cause No. 24. Knox County.

Reply of Defendant to the Assignment of Error on Behalf of Plaintiff.

Statement of case.

In its statement of the case, plaintiff has set out as facts so many matters not found in the written finding of facts made by the trial judge and which, we respectfully insist, are not warranted by the evidence, that without attempting to follow and correct said statement in detail, we prefer to submit the case in our own way, supported by the record on every material proposition.

This suit was instituted on the 1st day of May, 1901, by the plaintiff, a municipal corporation, by a warrant issued by its recorder against the defendant, a domestic corporation, chartered and organized under chapter 104 of the Acts of 1877, for the purpose of supplying Knoxville and its inhabitants with water, and seeking to collect a penalty of "not less than ten nor more than fifty dollars" "for charging and collecting of one" W. K. McClure for water furnished and to be furnished him by defendant more than the rates prescribed by the ordinance passed by plaintiff on March 30, 1901.

The defendant was "arrested" and brought before said re-
198 corder and by him fine- fifty dollars, and committed to the workhouse of Knox county, in the event said fine was nor paid or secured.

From this judgment, and sentence defendant appealed to the circuit court of Knox county.

Tr. pp. 2–3.

In the circuit court defendant moved to quash the recorder's warrant, because:—

1st. Said warrant does not set forth and aver any such state of facts, which if admitted to be true would entitle plaintiff to a judgment against this defendant.

2nd. Said warrant does not set forth the ordinance or the substance thereof, which it is alleged has been violated by defendant so that the court may see and determine whether plaintiff hath a right of action under it.

3rd. Said warrant fails to show, but should set forth and aver the substance of the ordinance upon which said warrant is based, and the particulars wherein it is claimed defendant hath violated said ordinance.

Defendant's motion to quash was overruled by the court, to which action of the court, defendant excepted.

Tr. pp. 28.

This was *error* against defendant. The motion should have been sustained, and the warrant quashed. The ordinance either *in hæc verba*, or in substance should have been set forth in the warrant, because like any other fact it must be pleaded, and the court will not take judicial knowledge of it.

State *vs.* Crinshank (Vt.) 42 Atl. Rep. 983.
Shanfetter *vs.* City of Baltimore, (Md.) 31 Atl. Rep. 439.

Thereupon after its motion to quash had been overruled, defendant filed six pleas upon all of which plaintiff joined issue.

These pleas are in substance as follows:—

First. Not guilty.

Second. That the ordinance upon which the suit is based
199 violates the Constitution of the United States in that it impairs the obligations of certain contracts existing between plaintiff and defendant and binding on both, and which contracts authorize and empower defendant to charge in the operation of its business, the reasonable and just schedule of rates and charges therein set forth. Said contracts are filed with and made a part of said plea.

Tr. pp. 2–8 to 26.

Third. That said ordinance is oppressive and unreasonable in that:

1st. Under and by said contracts (filed with and made a part of the second plea) the plaintiff has an option to buy all the plant and property of defendant, upon an appraised valuation, taking into consideration all the rights, privileges, franchises, easements and other property of defendant, including the right to charge and collect from its consumers the just and reasonable schedule of rates provided in and constituting a material part of said contracts, and plaintiff by said ordinance seeks to, and does, depreciate the value of defendant's property to the end that it may acquire and purchase same below and under its real value.

2nd. Said ordinance arbitrarily reduces the just and reasonable prices which plaintiff under and by said contracts agreed to pay defendant for water furnished by defendant to plaintiff.

3rd. That it prevents defendant from entering into contracts and agreements with its consumers for reasonable and just prices for water sold and furnished them by defendant.

4th. That by said ordninance defendant will be deprived of its property and liberty without due process of law.

Tr. pp. 4–5–6.

Fourth. That said ordinance interferes with and impairs the contracts existing between defendant and its consumers wherein they had agreed to pay defendant for water furnished them the reasonable and just prices provided by said contracts.

Fifth. That the penalty prescribed by said ordinance is excessive.

200 Sixth. *Nil debit.*

The plaintiff had demanded a jury for trial of this cause,

but subsequently waived that demand and in lieu thereof demanded that, on the trial by the court, the court make a written finding of fact and law. Tr. p. 28.

In compliance with the demand of plaintiff, the trial judge, after the evidence had been heard, made and filed his written finding of facts and conclusions of law as follows:

First.

The plaintiff, The Mayor & Aldermen of the City of Knoxville is a municipal corporation, and the defendant is a private corporation, chartered and organized under the laws of the State of Tennessee, as shown by defendant's charter, a certified copy of which was offered, and filed in evidence on the trial of this cause, and reference is here made to the same.

Second.

On July 1st, 1882, the plaintiff entered into a contract with the defendant, under and by which the plant and works of defendant were built, and in which it was provided among other things, that the defendant company, upon the terms therein provided, should supply the city of Knoxville, and its inhabitants with water for fire protection and public, sanitary and domestic purposes, and that the defendant company should supply private consumers with water at a rate not exceeding five (5) cents per 100 gallons, "provided, however, which is expressly understood, that the entire cost of introducing the water from the mains into private residences, including cost of meter, when used, should be borne by the parties introducing or ordering the same;" a certifiec copy of this contract is filed as Exhibit "A" to the defendant's pleas in this cause, and reference is here made to the same, for its full terms and provisions.

Third.

At the time the contract of July 1st, 1882, was entered into
201 between plaintiff and defendant, the city of Knoxville comprised only the first nine wards of the city as it now exists.

On February 9th, 1888, as shown by the certified copy of the minutes of the city council offered in evidence by the defendant, the contract of July 1, 1882, was by agreement modified so as to reduce the amount to be paid by plaintiff to defendant for hydrant rentals.

Fourth.

On the 18th day of April, 1891, the town of North Knoxville which is now the 11th ward of the city of Knoxville, by consolidation under the act of 1897, entered into a contract with Wheeler and Parks, under and by which water works were built and established in said town of North Knoxville, and under and by transfer, dated on the — day of November, 1894, the defendant became the owner of all the rights of Wheeler and Parks under their contract with said town of North Knoxville and said contract and said assignments were offered in evidence by the defendant on the trial in this cause, and reference is here made to the same.

Fifth.

On the 29th of July, 1891, the Lonsdale-Beaumont Water Co. was duly chartered and organized under the laws of the State of Tennessee, as shown by defendant's charter, offered in evidence in this cause, for the purpose of supplying the town of West Knoxville, and its inhabitants with water, and on the 17th day of Sept., 1892, said Lonsdale-Beaumont Water Co. and said town of West Knoxville entered into a contract providing for a supply of water to said town and its inhabitants upon stipulated prices, and these prices are specifically set forth in said contract, which was offered as evidence in this cause, and reference is here made to the same. The town of West Knoxville is now the 10th ward of the city of Knoxville. On the 20th day of October, 1899, the plaintiff passed an ordinance giving permission to said Lonsdale-Beaumont Water Company and the Knoxville Water Company to consolidate, but in said
202 ordinance it was provided that the option, which the plaintiff in the contract of July 1, 1882, reserved to itself to purchase the plant of the Knoxville Water Company, was extended to and made to cover the whole plant of the consolidated companies, and it was further provided that the consolidated company should continue to furnish to people living in the 10th ward of the city of Knoxville, being the territory formerly known as the town of West Knoxville, water at a maximum rate not exceeding that fixed in the above-mentioned ordinance of Sept. 17, 1892, between the town council of West Knoxville, and the Lonsdale-Beaumont Water Company, and further that said consolidated companies should furnish water to people living in the remaining wards of the city of Knoxville, or who may hereafter come to live in said remaining wards, water at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the city of Knoxville, dated July 1, 1882, and the schedules of rates and charges then in force and operation by the defendant Knoxville Water Company, and it was further provided that within thirty days after said ordinance should go into effect that the Lonsdale-Beaumont Water Company should file their written acceptance of said ordinance in so far as it altered or changed said ordinance of Sept. 17, 1892 or July 1, 1882, and that thereupon said ordinance should be and become a part of each of said contracts, and in as full a manner as if the provisions of said ordinance were embraced in formal written contracts made and executed between plaintiff and said water companies; for the full terms and provisions of said ordinance, reference is hereby made to the same which is filed in this cause as Exhibit "E" to defendant's pleas herein. On the same date, to wit: October 20, 1899, both the Lonsdale Beaumont Water Company and the Knoxville Water Company by their proper officers filed their written acceptance of said ordinance of October 20th, 1899, and thereupon said ordinance became a part of said contracts of July 1, 1882 and Sept. 17, 1892.

203 Sixth.

The rates in force and operation by the Knoxville Water Company on the 20th day of October, 1899, were as set out in a pamphlet offered in evidence in this cause, by defendant and were published by defendant company on April 1, 1895.

Seventh.

On May 18, 1895, plaintiff passed an ordinance regulating meter rates to be charged by defendant company, but this ordinance was in fact only adopting the meter rates then in force by the defendant company and made some provision in regard to requiring the defendant company to furnish meters to consumers but in so far as the proof in this cause discloses, the court is unable to say whether the meter rates were subsequently charged in pursuance of the ordinance or in pursuance of the previous rates adopted by defendant inasmuch as they were one and the same.

Eighth.

After the passage of the ordinance of October 20th, 1899 and its acceptance by the Lonsdale Beaumont Water Company, and the Knoxville Water Company, these two companies were duly consolidated by a transfer of all the property including the aforesaid contract of Sept. 17, 1892 of the Lonsdale-Beaumont Water Company to the Knoxville Water Company, and the articles of consolidation or the deed of transfer was duly filed and recorded in the office of the secretary of state.

Ninth.

On March 30, 1901, the plaintiff attempted to pass an ordinance reducing the rates and charges to be made by the defendant company, and on April 30th, 1901, by a warrant issued by the recorder of the city of Knoxville, this proceeding was commenced by plaintiff against the defendant company to recover a penalty "of not less than ten dollars nor more than fifty dollars" charging, demanding and collecting unlawfully of W. K. McClure for water furnished and to be furnished him by said Knoxville Water Company in the city of Knoxville, more than the rates fixed by said ordinance of March 30, 1901.

204 That the provisions of said ordinance of March 30, 1901, upon which said ordinance is based is as follows:

"That it shall be unlawful for any person, firm, company or corporation or their officers, agents, servants or employees, supplying water to the inhabitants of the city of Knoxville to charge, demand or collect for water so supplied more than the rates hereinbefore set forth in sec. 1, of this ordinance, and it shall also be unlawful for any such person, company, firm or corporation, or their officers, agents, servants or employees to cut off or otherwise interfere with the supply, or refuse to furnish a supply of water to any consumer for failure to pay for same, provided such consumer tenders in lawful money the charge for such water at the rates

aforesaid, and any violation of this ordinance shall be a misdemeanor and upon conviction thereof before the recorder, the offender shall be punishable by a fine of not less than — ($10.00) nor more than fifty dollars, ($50.00) for each offense."

I find that the water for which the charge was made was furnished to tenants living in the property owned by J. S. Gratz, for whom W. K. McClure was agent, and as such agent he represented the owner Gratz in renting the property; that the bills were rendered to W. K. McClure, as agent, and paid by him in that capacity, but actually paid by the owner J. S. Gratz who lived in the city of Chicago, in the State of Illinois; that the bills rendered to said W. K. McClure, and paid as aforesaid, were in accordance with the rates prescribed by the ordinance of Oct. 20—1899 and in excess of the rates prescribed in the first section of the ordinance of March 30, 1901.

Tenth.

In regard to the passage at special meetings, I find the following to be the facts:

The regular meetings of the board of mayor & aldermen of the city of Knoxville, are on the first and third Fridays of each month, but under the charter of the city of Knoxville, the mayor has the power to call special meetings of the board of aldermen. The ordinance upon which this suit was based was passed, on its
205 first reading on March 9th at a special meeting of the council, and it was published on Sunday March 31, in the Knoxville Journal and Tribune, a daily newspaper published in the city of Knoxville. That newspapers in Knoxville Tennessee, have been issuing regularly since 1866, Sunday editions or issues, that these Sunday editions are as large if not larger than any editions during week days.

The said meeting of March 30, 1901, was in pursuance of a call of that date purporting to be signed by the mayor of the city of Knoxville, S. G. Heiskell, but in fact the name of the mayor to said call was signed by J. J. Atkins, chief of police of the city of Knoxville, who was instructed so to do by the mayor, but the mayor did not in fact see this call until it was read at the meeting of the council. The special meeting of March 9, 1901, was held in pursuance of a written call of same date, signed by the mayor, which, however, does not state the place of meeting. No notice of the meeting of March 9, 1901 was given to Aldermen Aiken, Trigg and Cleage, but Alderman Aiken attended the meeting, and no notice was given Alderman Cleage of the meeting of March 30, 1901; in regard to Aoderman Trigg it was not necessary for him to have notice because he had tendered his resignation to John E. McMillan, deputy comptroller of the city of Knoxville, from four to six weeks prior to the time it is dated on March 15th, 1901, when it was accepted by the council, and Alderman Kephart elected in his stead, and for some time previous to the meeting of March 9, 1901, said Trigg had abandoned and vacated his office by removing from the city of Knoxville to the city of Washington in the District of Columbia,

changing his residence and moving his family there, and was not entitled to notice. Alderman S. E. Cleage who represented the 6th ward of the city of Knoxville was an active alderman in the discharge of his duties, and had neither abandoned his office nor resigned the same. At the time of his election as an alderman of the city of Knoxville, and on March 9th and March 30th, 1901, he was in the employ of the Southern Railway Co. as law agent with his headquarters at Asheville
206 in the State of North Carolina and transacted his business principally in the States of North and South Carolina and outside the limits of the State, his territory including about 500 miles of railroad. That his duties requires him to go in person over his territory investigating and adjusting claims for damages against said R. R. Co., that during the months of Feb'y March and April he was more than usually busy in the discharge of his duties, but retained his home in the 6th ward of the city of Knoxville, and was active in the discharge if his duties as an alderman; that he attended nearly all of the regular meetings of the council and nearly all of the special meetings of which he had notice; that it was impracticable for him to have been present on March 30, 1901, at the special meeting on that date, but it was not impracticable to have given him notice of the special meeting of March 9th, 1901, but it does not appear that it was impracticable for him to have attended that meeting, that there was no emergency for this ordinance to be considered at special meetings of March 9—1901 and March 30—1901. It was the duty of the municipal authorities to inform Alderman Cleage of the special meetings of March 9– and March 30– and as a public servant and official he had a right to have notice of these meetings, but notice was not given him, and therefore this ordinance of March 30—1901, is invalid.

Eleventh.

The opinion of the witness Cleage as to what might have been practicable as to notice to him, and his ability to attend the special meetings over the objections of defendant the court holds incompetent, and irrelevant as well as his statement of how he would have voted on similar ordinances.

Twelfth.

I find that the ordinance of Oct. 20, 1899 was accepted by both the Lonsdale-Beaumont Water Company and the Knoxville Water Company, and by virtue of said acceptance, became parts of the contracts of Sept. 17, 1892, and July 1st, 1882, hereinbefore referred to, and that the consolidated Knoxville Water Com-
207 pany has been up to the present time complying with its contracts and the rates fixed by said ordinance and contract of Oct. 20, 1899, and the charges rendered to W. K. McClure, agent, as hereinbefore set forth, were in accordance with the rates prescribed by said ordinance and contract of Oct. 20, 1899; (but in my opinion the board of mayor & aldermen of the city of Knoxville is vested with the right to regulate and charge the rates prescribed by the ordinance and con-

tract of October 20, 1899, and if the ordinance of March 30, 1901, had been regularly passed, the same would have been operative to reduce the rates prescribed by the ordinance and contract of Oct. 20, 1899.)

Thirteenth.

I find that the difference in the rates prescribed by the ordinance of March 30, 1901, and the charges actually made to W. K. McClure, and collected off of J. S. Gratz, owner, as hereinbefore set forth is the sum of $1.15, for the three premises mentioned in the testimony of W. K. McClure, that is fifty cents, forty-two cents and twenty-three cents, respectively: W. K. McClure lives in the 10th ward of the city of Knoxville, formerly West Knoxville and his personal bill was paid under the Lonsdale-Beaumont contract, and was less than he would have had to pay under the ordinance of March 30, 1901.

Fourteenth.

I find that the water furnished to J. S. Gratz was furnished under a contract as follows:

"Knoxville Water Company, service # 2850.

KNOXVILLE, TENN., *Sept.* 17, 1896.

The undersigned hereby applies to the Knoxville Water Company for a supply of water at premises No. 708 High street, owned by J. S. Gratz, occupied by tenants, to be used for domestic purposes only, and I hereby agree to use and pay for the same in accordance with the rates, rules and regulations of the Knoxville Water Company as now or hereafter in force, and which are made part of this contract; and I further agree that the said company may enter upon any lands owned by me, or in which I may have such right, and place therein, upon the terms provided there-
208 for, all pipes that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require."

Which contract was signed by J. S. Gratz by his agent, W. K. McClure.

I find that the defendant has about four thousand (4,000) customers or patrons with whom it has contracts similar to the Gratz contract, set out above, to whom defendant is furnishing water under the rates in force on October 20, 1899, and that it is furnishing water to the city of Knoxville, for other than hydrant purposes at the rates prescribed in said contract of Oct. 20, 1899.

Tr. pp. 185–194.

NOTE.—*There was no request made of the court for a correction of any finding or for an additional finding of facts—and every material fact is as found by the trial judge.*

Judgment was entered in conformity with said written findings of facts, etc., dismissing plaintiff's suit and taxing it with costs. A

motion for a new trial was made and overruled and plaintiff appealed in error to this court.

To the action and judgment of the court below, plaintiff has filed three assignments of error—the third of which contains only fourteen subdivisions.

For convenience and because we deem it first in logical order, we will reply to the third assignment and its various subdivisions which relates to the written findings of the trial judge and his rulings on evidence:

First.

The plaintiff in error sais that the trial judge should have made his findings of fact separate and distinct from its findings of law. Technically, this is a correct statement of the rule, but the complaint that the trial judge "confused them throughout" is not borne out by the findings.

Tr. pp. 185–194.

209 The findings of the trial judge as to facts contain a brief, yet full statement of the ultimate and controlling facts, in their chronological and logical order, and the only pure finding of law is found at the conclusion of the tenth paragraph and is the legal conclusion of the facts therein stated.

The ruling of the court as to certain opinions of witness Cleage is set forth in paragraph eleven of the findings and is distinct from and not confused with any other ruling or finding of the court.

The opinion of the court set forth in the concluding *clause* of paragraph twelve and enclosed in brackets to the effect that plaintiff has the right to regulate rates, is, in view of the previous holding of the court that the ordinance in question is invalid, a mere *obiter dictum*, but a *dictum* of which certainly, the plaintiff cannot complain.

Second.

The complaint of plaintiff *in error*, as set forth in the second subdivision of the third assignment, is, we submit exceedingly hypercritical. There is no doubt but that the contract between defendant and J. S. Gratz owner of the premises to which the water was furnished, which contract was signed "J. S. Gratz, owner by W. K. McClure, applicant," is just as set forth on pages 40 & 41 of the transcript; nor is there any doubt but that the name of J. S. Gratz was signed to the body of the contract by W. K. McClure, as his agent (Tr. pp. 41 & 42) and this is the fair and legitimate construction of the finding in paragraph fourteen, which upon the point in question, seems to have intended only to set out the body and terms of the contract to which the name of J. S. Gratz was signed by W. K. McClure. Conceding to plaintiff all it claims in the 2nd subdivision will not alter the result or indeed the finding as made.

Third.

In reply to the third subdivision of the third assignment, we insist that the finding of the court as to whom the water was furnished

and by whom it was paid as set forth in the latter part of
210 paragraph nine briefly and correctly sets forth the facts as shown by the testimony of plaintiff's witness McClure—not every evidential fact in detail, but the ultimate legitimate construction to be placed upon the whole testimony of the witness, who, though he twisted and squirmed and evaded, finally admitted that the water in controversy was actually furnished to tenants living in the property of J. S. Gratz. who as owner of the property, ultimately paid the charges therefor.

Vide testimony of W. K. McClure, as follows:

"Q. And then the owner of the premises bears the water charges?

A. Yes sir.

Q. And the owner of these premises in these cases paid the water rent?

A. Ultimately so, yes sir.

Q. And he paid these charges that you are talking about?

A. Yes sir."

Tr. p. 42.

Fourth.

Replying to the fourth subdivision of the 3rd assignment I call the attention of the court to the 10th paragraph of the written findings by the trial judge which fully sets forth all the material facts relative to the passage of the ordinance in question at special meetings of plaintiff held on March 9th and March 30th, 1901, and that these findings by the trial judge are abundantly supported by the cross-examination of plaintiff's witness Alderman Cleage found in the record on pages 166–167–168–169 and 170. It is shown by the trial judge and it is admitted by plaintiff that the ordinance in question to be valid must be passed at three separate meetings of the city council, and that these separate meetings must be three regular meetings of the council or valid *called* meetings of the council, and it is admitted that Alderman Cleage, representing the 6th ward of the city of Knoxville in the city council was neither present at nor informed of the special and called meetings of March 9th and March 30th, 1901.

Plaintiff now admits that under the law it is necessary to give notice to each of the aldermen of the special or called meet-
211 ings in order to render such meetings valid or give some legal excuse why such notice is not given.

We submit that the rule is absolute, but plaintiff endeavors to give an excuse for failing to notify Alderman Cleage and claims that an emergency existed showing the necessity of the passage of the ordinance in question on the date stated.

Conceding that the plaintiff may avoid the force of the general rule, as to notice, to each of the aldermen by showing a legal necessity or emergency or that it was impossible to give notice, it will not be disputed that the burden of proof of these facts is upon the plaintiff.

In said subdivision four of the 3rd assignment, plaintiff says that the trial judge "erroneously finds that no emergency authorized the passage of the ordinance in question at a special meeting of the city council." The trial judge did find that no such emergency existed, or rather that no such emergency was shown, and we insist that the finding of the trial judge is correct. The emergency suggested by counsel in his brief is that it was "*just then discovered*" that there was a defect in a previous ordinance passed by the plaintiff on July 27th, 1900, which was objected to by defendant and permitted to be introduced over defendant's objection.

Tr. p. 73.

The only evidence of this claim that this supposed defect had "just been discovered," is found in the record cited by plaintiff in error at the bottom of page 62, where in a copy of a portion of the minutes of plaintiff in error, under date of March 9th, 1901, Alderman Birdsong is made to say that the words "per annum" had been left out of the ordinance of July 27th, 1900, but it nowhere appears in this record when this discovery was made, and indeed this statement of Alderman Birdsong would not be competent in establishing the fact claimed. Moreover, if we should concede that this discovery "had just been made," it would in no way be sufficient to prove such an emergency as would justify plaintiff in
212 error in violating the fundamental principle which must be observed in order to give validity to any called meeting.

Fifth and sixth.

We will reply to the 5th and 6th subdivision- of the 3rd assignment together.

Plaintiff in error insists that the trial judge erred in failing to find that the custom and practice was to give notice to only those aldermen who might be in the city when a special meeting was called, and that the trial judge also erred in excluding the evidence of such custom and practice. We reply:

1. That the evidence of this custom and practice was not excluded but was finally admitted and considered by the court. It is true that when witness Nelson testified to such alleged custom, his testimony was held incompetent upon defendant's exception (Tr. pp. 72–73); but when Mayor Heiskell came to testify to such alleged custom and practice extending over a period of six years, defendant's exception thereto was overruled and the testimony admitted. (Tr. pp. 149.)

2nd. But this alleged custom and practice in violation of the well-settled rule to the effect that each member of a municipal body is entitled to notice of all special meetings was immaterial and irrelevant and would not benefit plaintiff in error because it could not thereby be excused from giving notice.

The authorities cited by plaintiff in error, Angell & Ames on Corporations does not support this contention; on the contrary, it is expressly laid down in sec. 494 of the 9th edition of Angell & Ames on Corporation- that usage and custom will not justify either the lack

of notice or unreasonable notice to the members of a municipal corporation. And in sec. 492, it is further laid down:

"In the case of absence, notice must be left with the member's family or his place of abode. It is no sufficient reason for
213 omitting to summon a member that it was supposed that he was without the reach of summon; for to support the validity of corporate acts, each member must be actually summoned."

Seventh and eighth.

Replying to the 7th and 8th subdivision of the 3rd assignment, we say:

1st. There was no exception taken to the ruling of the trial judge excluding the testimony of Alderman Cleage that he favored the ordinance in controversy and would have voted for it had he been present. This evidence was offered by the plaintiff in error and upon the objection of defendant held incompetent and excluded by the court, and no exception was taken thereto by plaintiff.

See Tr. p. 165.

The ruling of the court to which plaintiff in error did except was excluding witness Cleage's statement that he favored the passage of the ordinance of July 27th, 1900, which was not the ordinance in question, at all.

Tr. p. 165.

2nd. It was utterly immaterial whether Alderman Cleage would or would not have voted for the ordinance in question. The rule requiring notice to all aldermen is one based upon grounds of public policy, and is for the benefit of the public and is general.

See authorities hereafter cited.

Ninth.

Replying to the 9th subdivision of the 3rd assignment to the effect that the trial judge erroneously excluded on the exception of the defendant the opinion of Alderman Cleage as to whether it was practicable or impracticable to have given him notice of the special meetings of March 9th and March 30th. And as to whether it was practicable or impracticable for him to have attended those meetings, we call the attention of this court:

1st. That this was simply a matter of opinion on the part of the witness.

214 2nd. There was no exception taken then or later to the action of the court, excluding such opinion.

See Tr. p. 164.

Tenth.

Replying to the 10th subdivision of the 3rd assignment to the effect that the trial judge erred in finding that it was practicable to have given Alderman Cleage notice of the special meetings of March 9th and March 30th, 1901, and that it does not appear to have been impracticable for him to have attended the meeting of March 9th and

March 30th, we submit that this finding by the trial judge and indeed the whole of the finding of the trial judge as set forth in paragraph 10 of his finding (Tr. pp. 190–1–2.) is justified by the weight of the evidence and has material evidence for its support. The evidence upon which the findings of the trial judge in this particular is based is briefly as follows:

"When Alderman Cleage was elected an alderman for the 6th ward of the city of Knoxville, he was then, as he was in March 1901, residing with his mother on Broad street in the city of Knoxville, but he was in the employ of the Southern railway with headquarters principally at Asheville" (Tr. p. 162). He was active in the discharge of his duties as an alderman (Tr. p. 169.) attended nearly all of the regular meetings and such special meetings as he had notice of (Tr. p. 169); that he was usually informed by telegraph of the special meetings and had attended as many as three special meetings in one week, coming hundreds of miles so to do. (Tr. pp. 162–169–170.)

So we say that this alderman had received notice and that it was practicable to give him notice by the use of the telegraph, and that this was the usual way he was notified of special meetings and that he attended them when he was notified. It is not the case of an alderman going out of town temporarily, or being called out upon an emergency when his whereabouts may or may not be known, but it is the case of an alderman having a fixed residence in the ward which he represents in the city council, and having
215 fixed headquarters where notice can be given him, and in this connection may it please your honor, we desire to call the attention of the court to the following facts:

1st. Notice of both the meeting of March 9th and the meeting of March 30th, was issued on the *same day* of the evening of which the meetings were held.

Tr. pp. 47–50–51.

2nd. The name of the mayor was signed to the call of March 30th, 1901, by one J. J. Atkins, and said call was not seen by the mayor until the counsel met on the evening of March 30th, 1901.

Tr. p. 154.

3rd. *That in the call for the meeting of March 9th, 1901, no place of meeting is stated.*

4th. *That no sort of effort was made by the mayor to* notify Alderman Cleage of the meetings of March 9th and March 30th, 1901.

Tr. p. 152.

Eleventh and twelfth & thirteenth.

Replying to the 11th, 12th, and 13th subdivision- of the said 3rd assignment, we insist that the finding of the trial judge in relation to the matters referred to in these subdivisions is abundantly supported by the evidence, and that in any event the matters referred to in said 11th, 12th and 13th subdivisions are immaterial and irrelevant and cannot in any way benefit plaintiff in error or alter the result.

Fourteenth.

The 14th subdivision of the 3rd assignment is as follows:

"The court erred in overruling the plaintiff's motion for new trial, and in not making a full and accurate finding of facts."

Where the action is tried by the judge without the intervention of a jury, and the written statement of facts is demanded by either party, it is sufficient if there be a substantial compliance with
216 the statute, and only ultimate and controlling facts need be found and not the evidence upon which they are based.

McHale *vs.* Wellman, 101 Tenn. 153.

8th Am. & Eng. Ency. of Practice, 934–935–940 and 952.

And we submit that the written findings submitted by the trial judge was not only a substantial compliance with the rules, but set forth very fully the ultimate, material and controlling facts involved in this controversy.

Now in regard to the complaint made throughout the several subdivisions of the 3rd assignment to the effect that the trial judge failed to find this fact or another fact, we submit that the true rule is where the court fails to find specifically on all the material issues the proper remedy is to apply to the court for further findings.

8th Am. & Eng. Ency. of Practice, 944.

Supra, 950; citing Warner *vs.* Foote, 44 Minn. 176.

Aiken *vs.* McCarty, 2nd Wash., 112.

This is analogous to the practice of the court of chancery appeals of this State, whose duty it is, under the statute to make a written finding of the facts, and when such written findings of fact do not cover the whole case, and when other and additional facts are desired, they must be called for.

Hall *vs.* Hale, 99 Tenn. 537.

Anderson County *vs.* Hayes, 99 Tenn. 565.

In considering the various matters discussed in the many subdivisions of plaintiff's 3rd assignment of error, and particularly where it is insisted that the trial judge should not have found certain facts, or that certain facts are not supported by the weight of the testimony, we respectfully refer the court to the well-established rule that the finding of the trial judge has the same weight in this court as the verdict of a jury, and will not be reversed on a consideration of the facts if there is any material evidence to support it.

217 Etta *vs.* Richardson, 89 Tenn. 580.

Stanley *vs.* Donaho, 16 Lea, 492.

Folwell *vs.* Laird, 12 Heisk. 464.

Mabyr *vs.* Memphis, 12 Heisk. 589.

State Insurance Co. *vs.* Hughes, 10 Lea 462.

Smith *vs.* Hubbard, 85 Tenn. 306.

Reply to First Assignment.

The next in logical order is the first assignment of error, which is as follows:—

"The court erred in holding that the plaintiff was bound to give Alderman Cleage notice of the special meetings of March 9th and March 30th, 1901, at which the ordinance in question was passed on its first and third readings, and for its failure to give such notice, said ordinance is void."

The facts in regard to the particular special meetings above referred to are clearly set forth in the 10th paragraph of the written findings by the trial judge.

Tr. pp. 190–191–'2.

There is no doubt but that the meeting- of March 9th and March 30th were special or called meetings, and the general rule is that at such meetings all the aldermen must be notified.

Land Co. *vs.* Jellico, 19 Pickle, 320.

And this rule is well supported by an almost unbroken line of authorities, on this question.

1st Dillon on Munc. Corp. sec. 263–286.
Am. & Eng. Ency. Law, pp. 1035–1080–1081.
1st Beech Pub. Corp. sec. 271.
Lord *vs.* Anoka, 36 Minn. 176.
Beaver Creek *vs.* Hastings, 56 Mich. 528.
Board of Supervision *vs.* Horton, 75 Iowa, 371.
Paola *vs.* Commissioners, 16 Kansas, 302.
People *vs.* Batchelor, 22 N. Y. 128.
Harding *vs.* Vandewater, 40 Cal. 77.
218 Stowe *vs.* Wise, 7 Conn. 214.
2nd Cooke on Corp. sec. 594, 596.
Medical Society *vs.* Weatherly, 75 Ala. 248.
Bank of Little Rock *vs.* McCartha, 53 Ark. 473.
Wiggins *vs.* Free Will Baptist Church, 8 Mass. 301.

The authorities cited by plaintiff in error in support of its first assignment of error are so variant from the principles contended for by plaintiff in error that we are almost forced to the conclusion that counsel have made some mistake in their citations.

1st Dillon on Munc. Corp. sec. 262–285 and 286, is a direct authority for the contention of defendant that special meetings of March 9th and March 30th, were invalid, because of the lack of notice to Alderman Cleage, and because if notice had been given him after the call therefrom it would have been unreasonable in that sufficient time would not have been allowed him to attend the meeting; and to the same effect is the citation from the Am. & Eng. Ency. of Law, vol. 15, 1st edition, nor is there anything favorable to plaintiff in the citation from Thompson on Corp. In fact the rule contended for by defendant is recognized and applied by that eminent au-

thority. And to the same effect are the citations from Cooke on Corp. and Clark on Corp. Counsel, also cite the case of State *vs.* Kirk, 46 Conn. 395, and we have a copy of the decisions of the court in that case, which abundantly recognizes the rule that it is imperative that every member of a municipal body have notice, and in that case one of the members of the municipal board being temporarily out of the State written notice was left at his residence, and place of business. In sec. 6176 of Thompson on Corp. and based upon the case of Bank of Little Rock *vs.* McCarthy, *supra.* Mr. Thompson lays down an exception to the general rule where a director or member of a municipal body is absent or absconding from the State and cannot be located after a *reasonable* search; but
219 he also says that to excuse notice to all the members there must be a concurrance of three conditions:

1. Inpracticability of notice.
2nd. The existence of an emergency of action.
3rd. The reasonable existence for the action taken.

Now then by the theory and contention of plaintiff these conditions did not exist on March 9th and March 30th, 1901, when the special meetings in question were held. On the contrary plaintiff wholly fails to show that it was impracticable to have given notice to absent aldermen. The trial judge finds that it was practicable to have given him notice. It is admitted by the mayor that it was not attempted to give notice to Alderman Cleage. Further in case of special meetings it is necessary not only that notice should be given, *but reasonable notice of the time* and *place* of meeting must be given.

2nd Cooke on Corp. sec. 595.

The call for both of the special meetings was issued some time during the days of March 9th and March 30th, for a meeting at 7.30 p. m. of the same date; the notice and call for the meeting of March 9th does not specify the *place* at which the meeting was to be held.

Tr. pp. 51–191.

Further the ordinance of March 30, 1901, could not become a valid and enforcible ordinance and was not legally printed and published by the authority of the corporation.

See charter of the city of Knoxville, sec. 28.
Horr and Bemis ordinances, sec. —.

This ordinance was never published except on Sunday the 31st day of March, 1901, in the Journal and Tribune of that date. This was not a legal and valid publication.

16 Am. & Eng. Ency. of Law. 1st edition, p. 822.
Scammon *vs.* Chicago, 40 Ill. 146.
220 Shaw *vs.* William, 87 Ind. 158. 44 Am. Rep. 756.
Shaw *vs.* Dodge, 5 N. H. 462.
Smith *vs.* Wilcox, 221 N. Y. 353.
Schewd *vs.* Hartwitz, 23 Colo., 187.
Sawyer *vs.* Cargille, 72 Ga. 290.
McLaughlin *vs.* Wheeler, 2 S. D. 379.

McChesney *vs.* People, 145 Ill. 614.
Dumars, *et al. vs.* City of Denver, 65 Pac. Rep. 580.
Ownsby *vs.* City of Louisville, 79 Ky. 197.
Sewell *vs.* City of St. Paul, 20 Minn. 511.

Reply to Second Assignment.

The second assignment of error is to the effect that the court erred both in dismissing plaintiff's suit and taxing it with costs, and in not giving judgment against the defendant because plaintiff had the right and authority to pass the ordinance in question regulating rates and because the rates being enforced by the defendant were in excess of the ordinance in question.

If we concede that chapter 104 of the Acts of 1877, under which the defendant company was chartered and organized conferred upon the city of Knoxville, the right "to regulate the price of water supplied" by defendant company, we insist that such power can only be exercised under certain conditions, and that the same may be limited by contract and was limited by contracts entered into between the city of Knoxville and the defendant water company, dated July 1st, 1882, and October 20th, 1899, which are found in the record as Exhibits "A" & "B" to defendant's second plea.

Tr. pp. 8 to 28, inclusive.

The trial judge found that this contract had been entered in*to;* that under the contract of July 1st, 1882, the original plant and works of the defendant company were built and that the defendant company had been in all respects complying with its said contracts,
and the rates and charges therein provided. The ordinance
221 of March 30th, 1901, passed about 17 months after the contract of October 20th, 1899 was entered into is a manifest and admitted impairment of that contract in that it arbitrarily reduces the rates and charges therein provided.

Therefore said ordinance of March 30, 1901, is in violation of section 10 article 1 of the Constitution of the United States.

New Orleans Water Works Co. *vs.* Rivers, 115 U. S. 674.
New Orleans Gas Light Co. *vs.* Louisiana, 115 U. S. 650.
St. Tammany Water Works Co. *vs.* New Orleans, Water Works Co. 120 U. S. 64.
Walla Walla *vs.* Walla Walla Water Co. 172 U. S. p. 1.
Los Angeles Water Co. *vs.* Los Angeles, 177 U. S. 570.
Santa Anna Water Co. *vs.* Town of etc. 56 Fed. Rep. 339.
Bank of Ill. *vs.* Akron City, etc. 76 Fed. Rep. 671.
Old City Trust Co. *vs.* City of Atlanta, 83 Fed. Rep. 42.
Los Angeles Water Co. *vs.* Los Angeles, 63 Fed. Rep. 720.
City of Cincinnati, *vs.* Cameron, 53 Ohio 336.
Cable Co. *vs.* Baltimore, 66 Fed. Rep. 140.
Los Angeles Water Co. *vs.* City of Los Angeles, 103 Fed. Rep. 711.
Crosby *vs.* City Council of Montgomery, 108 Ala. 498.
State *ex rel. vs.* La Clede Gas Light Co., 102 Mo. 472.
Logansport Gas Co. *vs.* City of Peru*a*, 89 Fed. Rep. 185.

The case of Freeport Water Co. *vs.* Freeport, 180, U. S. 187 (followed in Rogers Park Water Co. *vs.* Fergus; and Danville
222 Water Co. *vs.* Danville City, both reported in 180 U. S.) so much relied upon by plaintiff is not opposed to the decisions hereinbefore cited; on the contrary, the principle contended for by the defendant water company is expressly recognized in said case:—

"It is not clear from the opinion of the court (the supreme court of Ill.) whether it intended to decide that municipal corporations cannot be invested with the power to bind themselves upon an irrevocable contract not to regulate water rates. If so, we cannot concur in that view. We have decided to the contrary many times, and very lately in Los Angeles *vs.* Los Angeles City Water Co. 1900, 177 U. S. 558. Se- also New Orleans Water Works Co *vs.* Rivers, 115 U. S. Rep. 674."

In the Freeport case an Illinois statute gave the city council authority to "empower a private corporation to construct and maintain water works at such rates as *may be fixed by the* ordinance & for a period of not exceeding 30 years.

The supreme court of Illinois held that "the meaning of this language is not that the water works are to be maintained at such established rate as may be fixed by an ordinance for a period not exceeding 30 years," and that the city could by ordinance reduce the rates fixed by an ordinance.

On writ of error the United States Supreme Court by the bare majority of five to four (Justices White, Brewer, Brown and Peckham vigorously dissenting) held that the statute was ambiguous, and that pursuant to the general rule of decisions on writs of error to the State courts, that "for the sake of harmony and to avoid confusion the Federal courts will lean towards an agreement of view with the State courts if the questions seems to them balanced with doubt," the construction by the State court should be adopted by the Federal court.

It must be observed, and unquestionably it had great weight with the Supreme Court of the United States that the rates sought to be enforced by the water company in Freeport cases were unjust, oppressive and unreasonable, and so admitted by the water company in the pleadings, and this court will observe from an inspec-
223 tion of the opinion in that case, that the rates sought to be enforced by the Freeport Water Company were double the rates provided in the contract between the city of Knoxville and defendant company.

Further we submit that the ordinance in question is void because it violates the 14th amendment to the Constitution of the United States, in that it deprives defendant company of its property and liberty without due process of law.

By the contract of July 1st, 1882, plaintiff acquired an option upon the plant and property of the defendant company. At this time the city of Knoxville comprised only the first nine wards of the city as it now exists; contiguous to these nine wards was a municipality known as the town of North Knoxville, and this municipality in 1891, entered into a contract with Wheeler and Parks providing for

a supply of water and also providing a maximum schedule of rates and charges which said Wheeler and Parks were authorized to charge for the water supplied by them. This contract of Wheeler and Parks was afterwards assigned to the defendant company. Another municipality known as the town of West Knoxville was contiguous to the original nine wards of the city and this municipality entered into a contract with the Lonsdale-Beaumont Water Company and in this contract said Lonsdale-Beaumont Water — were authorized to charge according to the maximum schedule specifically set forth in the contract.

In 1897, by chapter 323 of the Acts of the General Assembly of the city of Knoxville and the town of West Knoxville and of North Knoxville were consolidated and by section 8 of that act it is provided that all the valid and lawful contracts of said towns should be carried out and performed by the consolidated municipality. On the 20th day of October, 1899, the Lonsdale Beaumont Water Company and the Knoxville Water Co. were by ordinance of the city of Knoxville given permission to consolidate upon the express condition that the option reserved by the city of Knoxville in the contract of July 1st, 1882 was extended to and made to cover all
224 the property, franchises, rights and privileges then owned by the Knoxville Water Company, and which thereafter might be acquired by it or said consolidated company, and further providing that the consolidated company should continue to furnish to the inhabitants of the 10th ward, formerly the town of West Knoxville, water at a maximum rate not exceeding that fixed in the contract of Sept. 17th, 1892, between the Lonsdale-Beaumont Water Co., and the town of West Knoxville and further providing that the consolidated water Co., should furnish the people living in the remaining wards of the city of Knoxville, other than said 10th ward, or who may hereafter live in said remaining wards or such wards as might thereafter be added to the city of Knoxville water at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Co. and the city of Knoxville dated July 1st, 1882, and the schedule of rates and charges then in force and operation by the Knoxville Water Co. and the rates and charges in force by the Knoxville Water Co. on Oct. 20th, 1899, are found in the pamphlet attached to the record at page 155, and that schedule of rates and charges was being enforced when this action was brought and it was the rates and charges provided in that schedule which were charged and collected from J. S. Gratz, through his agent W. K. McClure. Said ordinance of Oct. 20th, 1899, provided that it should become a part of the contracts existing between the Lonsdale-Beaumont Water Co. and the Knoxville Water Co. and the city of Knoxville, provided that within thirty days after the passage of said ordinance it was accepted by said companies, and said companies duly filed their acceptance of said ordinance on the 20th day of October 1899.

Tr. pp. 21–'3–'4–'5–'6.

The consolidation provided for in said ordinance of Oct. 20th, 1899, was duly effected by a sale and transfer of all the property of

the Lonsdale-Beaumont Water Co. to the Knoxville Water Co. and said articles of consolidation or transfer were duly filed in the
225 office of the secretary of state in compliance with the statute. Tr. pp. 133 to 139.

In case plaintiff exercises the option to purchase the plant and property of the defendant company it was provided by said contract of July 1st, 1882, (Tr. p. 16) that all the property, rights, privileges and franchises and easements of the defendant company should be appraised, and we insist that the material part of the property and rights of the defendant company was and is its contracts with the city of Knoxville, and the rights thereunder guaranteed to the defendant company, including the right to charge according to the schedule hereinbefore referred to. The income of the defendant company is dependent upon the revenues collected by it from its patrons, and the reasonable and just charges which it may enforce against them. If plaintiff is permitted arbitrarily to reduce these rates and charges, that is to reduce the schedule of rates and charges provided for in the contract of Oct. 20, 1899, which must be presumed to be reasonable and just, it can arbitrarily reduce and impair the value of defendant's property which it may be compelled to buy upon an appraisal under the contract of July 1st, 1882, and it can also arbitrarily, and by the ordinance of March 30, 1901, does arbitrarily undertake to reduce the amounts which plaintiff agreed to pay to defendant company for water furnished to it, that is, to plaintiff.

Defendant has with its customers more than 4,000 contracts similar to the Gratz contract found in the record at page 190, and by this ordinance of March 30, 1901, all of these contracts are impaired and the right to contract with its patrons for reasonable charges is thus taken away from defendant company arbitrarily, without a hearing and without the means provided of reviewing the charges prescribed in said ordinance.

The legislature cannot constitutionally delegate the power to fix prices at which water shall be sold in a city, to the authorities of the city, which is itself a consumer, either in its municipal capac-
226 ity, or through its inhabitants, without some provision for a judicial investigation of the reasonableness of the rates fixed by such authorities.

Agua Pura Co., *vs.* Las Vegas, 50 L. R. A. 224.

In the case of Cleveland Gas Light and Coke Co. 71 Fed. Rep. 614, Mr. Justice Jackson denounces as a "fearful proposition, quite, monstrous, absurd and outrageous" an attempt on the part of the city of Cleveland similar to that of the city of Knoxville is attempting to do by the ordinance in question. He further said there is hardly any law in this land that would make the party being furnished the judge of the price that he should pay or would say that his arbitrary decisions should fix the right of the parties.

In Auga Pura *vs.* Las Vegas, *supra*, the court quoted approvingly the language of Judge Jackson and held that the action of the city

authorities in attempting to fix such rates and enforce each violation by a penal ordinance without making any provision for a judicial investigation of the reasonableness of these rates was invalid and void and in contravention of the 14th amendment to the Constitution of the United States.

By *due process*, which is synonomous with the "law of the land" is intended that general law of the land which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. Again the phrase "due process of law" certainly means and implies a conformity with the natural and inherent principles of justice and right and forbid that one man's property or right to property shall be taken for the benefit of another, or *the* for the benefit of the State, without compensation. And that no one shall be condemned in his person or property without in proper form being heard in his own defense.

Holden *vs.* Hardy, 169 U. S. 390.

Therefore the defendant was entitled to judgment upon its third plea.

If the court should be of the opinion that the view and opinion of the learned circuit judge in regard to the invalidity of the
227 ordinance in question because it was passed at a void special meeting was erroneous, and also be of the opinion that the publication of said ordinance on Sunday was not illegal, then we respectfully insist that the judgment of the lower court is correct, because:

1st. The water which it is alleged in the warrant of the recorder was sold by defendant company to W. K. McClure was not sold to him, but was in fact sold through him to J. S. Gratz, who paid the charges sought to be enforced by defendant company therefor. The ordinance in question is a penal ordinance and is must be strictly construed.

2nd. The judgment in favor of defendant company should be maintained because the ordinance in question violates sec. 10 article 1 of the Constitution of the United States, in that it impairs the provisions of the contracts existing between defendant company and plaintiff.

3rd. It is unjust and unreasonable and deprives defendant of its property and liberty without due process of law.

Therefore for these reasons the judgment of the lower court should not be reversed, although this court may be of the opinion that the trial judge assigned erroneous reasons for its rendition.

Railroad Company *vs.* Mahoney, 85 Tenn. 318.
Hughes *vs.* Marquet, 85 Tenn. 127.
Chambers *vs.* Chambers, 92 Tenn. 710.

Respectfully submitted.

CHARLES T. CATES, JR., *Att'y.*

228 (*Printed Brief for M. & A.*)

In Supreme Court of Tennessee, September Term, 1901.

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY.

Brief for Plaintiff.

PICKLE & TURNER,
Counsel for Plaintiff.

Filed Oct. 8, 1901.

J. G. STUART,
Deputy Clerk.

In the Supreme Court at Knoxville, Tenn., September Term, 1901.

MAYOR AND ALDERMEN OF Knoxville
vs.
KNOXVILLE WATER COMPANY.
Law Cause No. 24. Knox County.

Brief and Argument on Behalf of the Plaintiff.

This is a suit to recover of the defendant a penalty for its violation of a municipal ordinance regulating and fixing water rates. The violation of the ordinance is undisputed, but its validity on several grounds is questioned.

I.

Has the city the right to regulate?

The defendant perhaps concedes this right in the abstract, but denies it in this case. It insists that by reason of certain contracts, heretofore made between the city and the water company, the city has surrendered that right, or thereby exhausted its power
229 to regulate, and that any attempt at further regulation is in conflict with the Constitution of the United States and of the State of Tennessee, guaranteeing the inviolability of contracts.

This is the principal question in the case, all others being merely incidental. We will first consider this question.

1. The city has the right to regulate.

By the charter of the city of Knoxville, as compiled from former acts, and as embodied in the Acts of 1885, special session, chap. 8, section 18, subsection 7, the board of mayor & aldermen is authorized by ordinance "to provide the city with water by water works, within or beyond the boundaries of the city, or provide for supplying the city with water otherwise."

The Knoxville Water Company was chartered and organized under the act of 1877, ch. 104, amendatory of the act of 1875, ch. 142. Section 2 of that act, provides, that such charter shall not be

granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village in which it is proposed to operate such water works, and such leave shall be certified by the mayor or recorder upon the application and registered with it, *but this is in no way to interfere with the police or general powers of the corporate authorities of such city, town or village,* and such corporate authorities shall have power by ordinance to regulate the price of water to be supplied by such company.

Thus it appears that the right to regulate water rates by municipalities in Tennessee is granted by the very act authorizing the incorporation of water companies, and becomes thereby a condition upon which the charter, franchises and privileges of the water company are granted.

It has long been well settled that the State, by direct enactment of its legislature, or by authority delegated by the legislature to counties or municipalities, may regulate public utilities, and the
230 rates to be charged for public service by corporations or individuals, rendering any service to the public. This doctrine has been applied to elevators, warehouses, common carriers of all kinds, telegraphs, telephones, gas companies, water companies, and other public or quasi-public servants.

The leading case on this subject is that of

Munn *vs.* Warehouses, 94 U. S. 133.

See also, Turnpike Co. *vs.* Croxton, (Ky.) 33 L. R. A. 177 and extensive note thereto, reviewing the various cases on the subject.

R. R. Commission cases, 116 U. S. 307, 347, 352.

San Diego Water Co. *vs.* San Diego, (Cal.) 62 American State Reports, 261, and extensive note thereto, reviewing many cases on the subject, p. 289.

Danville *vs.* Danville Water Co. (Ill.) 69 Am. St. Rep. 304.

Rogers Park Water Co. *vs.* Fergus, (Ill.) 69 Am. St. Rep. 315.

That such power may be delegated to a city see, the San Diego case, *supra.*

2. *The city by contract has not and cannot surrender this right, and having contracted at one time for a particular schedule of rates, it does not thereby exhaust its power to regulate.*

On the 1st day of July, 1882, an agreement was entered into between the city and the water company in regard to the erection by the latter of water works, and the supplying for a period of thirty years, the city and its inhabitants with water, in which among other things, it is stipulated by section 7 "Said company will supply private consumers with water *at a rate not to exceed 5c. per hundred gallons.*"

This contract is monopolistic. It provides as follows:

"2nd. The city further obligates itself not to grant to any other person, or corporation, any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the
231 public streets, lanes or alleys, or other public grounds for the purpose of furnishing said city or the inhabitants thereof

with water, for the full period of thirty years from the 1st day of August, A. D. 1883."

On April 18, 1891, an ordinance was enacted by North Knoxville, constituting an agreement between it and Wheeler and Parks for the latter to supply said town and its inhabitants with water until June 3, 1913, and by section 9 of that ordinance it was provided that water to be furnished private consumers shall be charged for at "*not exceeding the rates contained in the following schedules,*" and then sets out said schedule of rates.

That contract was subsequently assigned to the Knoxville Water Company by Wheeler and Parks, and the town of North Knoxville became consolidated with, and incorporated into, the city of Knoxville.

On September 17, 1892, an ordinance was enacted by the city of West Knoxville, constituting an agreement between it and the Lonsdale-Beaumont Water Company for the supplying of water to said town and its inhabitants by said company for a period of twenty years, in which it was provided, among other things, by section 9, that said company shall not charge consumers during the continuance of the franchise granted by said ordinance "*exceeding the following maximum annual rates,*" etc. and then sets out the schedule of such rates.

Said contract was subsequently assigned by said Lonsdale-Beaumont Water Company to the Knoxville Water Company, and the town of West Knoxville became consolidated with and incorporated into the city of Knoxville.

On October 20, 1899, an ordinance was passed by the city of Knoxville, then embracing the territory of North and West Knoxville, authorizing said Knoxville Water Company to take the assignment of said contract of the Lonsdale-Beaumont Water Company, to supply water to the inhabitants of the territory of West Knoxville, upon certain conditions, among which was, that they should fur-
232 nish to the inhabitants of such territory, *water at a maximum . "rate not exceeding that fixed in the ordinance and contract of September* 17, 1892." and further that they should supply to the inhabitants of the balance of the city of Knoxville, water "*at a maximum rate, not exceeding that* fixed by the contract of July 1, 1882, and the schedule of rates *and charges now in force and operation by the Knoxville Water Company.*"

It will be observed that, by these several contracts, and ordinance, the city, in granting franchise to the water company, contracted and bound it to furnish water, and not to charge *more than certain maximum rates fixed by said contracts and ordinances.* We deny that these contracts and ordinances exhausted the power of the city to further regulate rates to be charged by the water company, if such regulation should in the future be advisable.

On May 17, 1895, the city passed an ordinance regulating the supplying of water by meter, and fixed the rates and charges therefor to private consumers, and these rates were incorporated into the schedule of rates of the defendant in force on October 20, 1899.

On July 27, 1900, the city passed another ordinance regulating

and fixing the rates generally to be charged to consumers of water, at a lower rate than that fixed by the schedule in force on October 20, 1899, and repealed all former ordinances in conflict therewith.

Again on March 30, 1901, the city re-enacted this ordinance of July 27, 1900, with slight amendment, fixing the same schedule of water rates as those set out in the ordinance of July 27, 1900.

The present suit arises under the last ordinance.

While the defendant in its pleas sets up the facts that this ordinance is unreasonable and oppressive, and is calculated to deprive it of its property without due process of law, yet it has offered no proof whatever tending to show that this schedule of rates is unreasonable, in that it fails to provide fair and reasonable com-
233 pensation for the service to be rendered by the defendant to its patrons. The presumption therefore, is that, so far as the rates are concerned, they are reasonable, although less than the maximum rates named in the former ordinances and contracts.

When the power to regulate rates for public service of a public corporation is delegated to a city, the city becomes invested with such power as a public trust, and cannot divest itself thereof by contract.

Huron Water Co. *vs.* Huron, (S. Dak.) 30 L. R. A. 848.
Ogden City *vs.* Ogden Water Co. Utah, 41 L. R. A. 305.

The State (and of course a city) cannot contract away its police power, or limit its exercise by contract.

Bowman *vs.* R. R. Co., 125 U. S. 465.
Stone *vs.* Miss. 101 U. S. 814.
Butchers Co. *vs.* City Co. 111 U. S. 746.
Gas Co. *vs.* Light Co., 115 U. S. 50.
Mugler *vs.* Kansas, 123 U. S. 624.
New York *vs.* Miln, 11 Peters, 139.

"A schedule of maximum rates in a contract by a city with a water company, does not bind consumers to the payment of such maximum rates if they are unreasonable."

Griffin *vs.* Goldsboro Water Co., (N. C.) 41 L. R. A. 240.

"A charter specification of rates which it shall be lawful for a turnpike company to charge, subject to increase or decrease, if necessary to keep the company's dividends within certain limits, does not constitute an irrevocable contract between the State and the corporation, but is merely an indication that such rates are supposed to be reasonable, without precluding the subsequent exercise of legislative power to change the rates."

Turnpike Co. *vs.* Croxton, (Ky) 33 L. R. A. 177.

In case of Danville *vs.* Danville Water Co., (Ill.) the court decides as follows:

"The legislature has the power to regulate the rates at which water shall be supplied to the public by a water company
234 especially when such right is reserved by the statute under which said company was incorporated.

"Municipal corporations can exercise only such powers as are conferred upon them by their charters. All persons dealing with them must see that they have power to perform the proposed act.

"The statute empowering a city to authorize a private corporation to construct water works, and to contract for a supply of water, for a period not to exceed 30 years, gave no power to the city to bind itself by fixing a rate at which it must pay for such supply, for such entire period, and an ordinance fixing a rate for the entire 30 years is void.

"Although a city has been empowered by statute to authorize a private corporation to construct water works and to contract for a supply of water, not to exceed 30 years, a subsequent statute empowering any city in which a private corporation has been, or may be authorized to supply water for public use, to fix reasonable water rates, is constitutional, and an ordinance passed under the later statute reducing existing water rates, and fixing them at a reasonable price, is valid, although the city enacting it has, under the earlier statute attempted by ordinance to fix water rates at a certain figure for the entire unexpired period of 30 years."

Danville *vs.* Danville Water Co. 69 Am. St. Rep. 304.

To the same effect see the decision in the case of Rogers Park Water Co. *vs.* Fergus, 178 Ill. 571, cited in note to the foregoing case on page 315.

It is there held that an ordinance fixing the rates for the full period is merely a declaration that such rates are reasonable at the time when the ordinance was enacted, and that the city is not bound to recognize such rates as reasonable for the full period, and has power to fix the water rates so as to make them reasonable at any time, or from time to time, as changed conditions may affect the reasonableness of the water rates formerly established, and that mandamus will lie at the suit of a citizen to compel the water company to
235 furnish him with water at the changed rates, provided they are reasonable.

In the case of San Diego Water Co. *vs.* San Diego, from California, 62 Am. St. Rep. 261, the power to regulate water rates is recognized and enforced, with the like qualification that they must be reasonable.

The case of Rogers Park Water Co. *vs.* Fergus, cited above, and of Danville *vs.* Danville Water Co. and also the additional case of Freeport Water Co. *vs.* Freeport, all from the supreme court of Illinois were taken by writ of error to the Supreme Court of the United States, and on March 25, 1901, were affirmed.

21 Supreme Court Reporter, 490, 493, 505.

In these cases the Supreme Court of the United States held that municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract not to regulate rates, but such power must be conferred in explicit terms, and that a contract concerning governmental functions, as one which affects the right of a city to regulate rates of a water company, must be strictly

construed, and such functions cannot be held to have been contracted away by doubtful or ambiguous provisions, and further, that an ordinance granting an exclusive franchise to the water company, with the right to use the streets, requiring the municipality to pay certain rentals, and binding the company, among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise, by virtue of a provision that the grantee "shall charge the following annual rates to consumers during the existence of this franchise," as this is merely a regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise. This case would seem conclusive of the controversy in this case.

In Tennessee, it certainly cannot be contended that municipal corporations have been invested by statute with the power to bind themselves by irrevocable contract not to regulate water
236 rates. On the contrary, the right to regulate water rates is granted to such municipalities in the very act authorizing the incorporation of water companies. It becomes, therefore, a governmental function of such municipal corporations, and a condition upon which the charter, franchise and privilege are granted to the water company.

Water companies in Tennessee are quasi-public corporations, having under our statute the right to eminent domain, and to use the public streets, are "affected with a public use," and are therefore subject to regulation as regards rates charged to consumers.

Shannons Code, secs. 2499–2506.

Crumbly *vs.* Water Co. 15 Pick. 420.

The authorities relied on by the defendant are in nowise in conflict with the foregoing. The one most insisted on is that of Los Angeles *vs.* Los Angeles Water Co. 177 U. S. 558.

It will be observed that Justice McKenna, who delivered the opinion in the Los Angeles case above cited, delivered the opinions in the Illinois cases, *supra*, and he rested it upon the ground that express authority had been granted to Los Angeles to enter into a contract limiting its power to regulate water rates. It is said on page 470 of the opinion, that "it is not denied that a city had the power to regulate rates."

"The contract of July 22, 1868, with the water company provided that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said party of the second part, or their assignees, provided that they shall not so reduce water rates or *os* fix the price thereof, as to be less than those charged by the party of the second part for water," pp. 560, 570. It is therefore held that since the city had entered into this contract by such legislative authority, and that the contract did not grant the power to regulate rates, which power was already existent, but was a contract to limit that right, the city had no power by ordinance to regulate it.

237 It will be further observed that this case arose under acts and contracts made before the adoption of the constitution of California, of 1879, providing for the regulation of water rates, p. 567.

In the case of Old Colony Trust Co. *vs.* City of Atlanta, 83 Fed. Rep. 39, it is simply held that the city could not regulate street car fares, because no such power had ever been delegated to the city. The city asserted such power under the provisions of its own charter, and also those of the charters of the street car companies, but the court upon construing those charters, held that they granted no such power.

The charter of the street car company, granted certain franchises and privileges to the company, "provided that the rates and fares on said railroad shall be subject to the approval of the mayor & city council of the city of Atlanta." In the city ordinance granting to this company the use of the streets etc., it was provided that the charges for passage on said road shall not exceed 20 cents for any through line, and 10 cents for half lines, or short distances.

The court declines to express an opinion as to whether this constituted a contract between the city and the company, but said that if the proviso in the railroad company's charter granted any power to regulate, it was exhausted upon its first exercise. But the court does not determine what effect would be given to a direct grant of power to the city to regulate fares, instead of this mere reservation out of the franchises granted to the railroad company, and further held that the power to approve, such as was reserved in this charter, is not equivalent to the power to regulate and fix rates. See p. 42.

The case of Santa Anna Water Co. *vs.* Town of Buena Ventura, 56 Fed. Rep. 339, simply holds that the constitution of California of 1879, requiring annual regulation of water rates, would not avoid a valid contract previously entered into by a city with a water company, authorizing the water company to fix its own rates. The case has no application to the questions involved in the present case.

238 II.

It is further objected to this ordinance that it is invalid and inadmissible in evidence, because it was published in a Sunday newspaper.

This objection is not tenable.

It appears that the ordinance, by authority of the city, was published in the Sunday issue of the Journal and Tribune, a morning daily paper of the city of Knoxville, on March 31, 1901. It further appears that since 1866, Sunday editions of the daily papers have been published in this city, and that these editions are the largest and most important, have the largest circulation, and are the best advertising mediums of any of the daily issues of the papers.

By the charter of the city of Knoxville, Acts 1885, Special Session, chapter 8, section 28, it is provided, "This act is declared to be a public act and may be read in evidence in all courts of law and

equity, and all ordinances, resolutions and proceedings of the board of mayor & aldermen may be proved by the seal of the corporation, attested by the recorder, and *when printed and published by the authority of this corporation the same shall be received in evidence in all courts and places, without further proof, when certified to by the recorder.*"

This is the only requirement as to the publication of ordinances.

We insist, in the first place, that publication under this statute is not necessary to the validity of an ordinance, nor to its admissibility in evidence. It is simply a provision for one method of proving said ordinance, to wit: when printed and published by the authority of this corporation, the same shall be received in evidence in all courts and places without further proof, when certified to by the recorder. It is a provsions similar to those in statutes making the authorized published or printed copies of acts of the legislature sufficient evidence thereof. Where statutes *require* publication, they have, in some States, been held directory merely, and the pub-
239 lication not a condition precedent to validity of the ordinance.

Com. *vs.* Davis, 140 Mass. 485.
In re Smith, 65 Barb. 283.
Mayor *vs.* New York, 25 Wend. 693.

A distinction and a just one is made, under statutes, *requiring* publication, between ordinances prescribing police regulations, and imposing penalties, and mere property ordinances the latter being excepted, by construction, from the requirement.

State *vs.* Hoboken, 47 N. J. L. 148.

In the case of a statute it certainly could not be contended that its validity depended upon such publication, or that such publication was the only competent evidence to be offered of the statute.

We conceive that the same rule of interpretation must be applied to this act in reference to this city ordinance.

But in the second place, whatever be the purpose and effect of this publication, it is sufficient when made in a Sunday paper.

At common law, Sunday was *dies non juridicus*, and as a general rule all legal proceedings had on that day were void, but this rule did not extend to any other transactions on that day, unless they were such as became public nuisances, and then they were indictable as would be any other nuisance occurring on any other day.

Under statutes of many of the States, other acts on Sunday than judicial proceedings are forbidden and made unlawful. Such acts as fall within these statutes are void. Where such statutes do not exist the common-law rule prevails. Even in the case of judicial proceedings, the rule is not applicable to mere ministerial acts, such acts on Sunday being upheld as valid.

In the case of Shaw *vs.* Williams, from Indiana, reported in 44 Am. St. Rep. 756, relied on by the defendant, it is there distinctly held that the question is whether the act of the sheriff in ad-
240 vertising a sale on Sunday in a Sunday newspaper is one falling within the operation of the Indiana Sunday statute,

that such act was one in the ordinary course of the sheriff's business and was thus within the prohibition of the statute and consequently was void. But even in that State it is held that giving a notice of award on Sunday is valid, for it is not an act of common labor, nor a judicial act, but is simply a ministerial act in connection with a judicial proceeding, and is not specially prohibited by statute.

Kiger *vs.* Coates, 18 Ind. S. C. 81 American Decisions, 351.

Also it is held in Indiana that the delivery of an award on Sunday is not invalid, as it is not in contravention of the statute.

Shaw *vs.* Williams, 87 Ind. 161. See note to last case above.

That ministerial acts may be performed on Sunday, although judicial acts may not.

See Insuarnce Co. *vs.* Shrader, 89 Texas, 35; same case, 59 Am. St. Rep. p. 25.

20 Encl. Pl. and Pr. 1197, and cases there cited.

Mathews *vs.* Ausley, 31 Ala. 20, cited in above.

Also State *vs.* California Mining Co., 13 Nev. 203, cited 20 Encl. Pl. and Pr. p. 1197.

In Tennessee we have no statute prohibiting even the doing or exercise of any of the common vocations of life, and therefore the doing of such acts in Tennessee, is not a misdemeanor. Our statute merely prescribes a small penalty to be recovered by a *qui tam* action for such violations of this statute.

Shannon's Code, sec. 3029.

State *vs.* Lorry, 7 Baxter, 95.

And under such statutes, such acts, although subjecting the performer to the penalty prescribed will not thereby become unlawful or be rendered void.

Contracts in Tennessee made on Sunday have never been held by our supreme court to be void. It is held by the Federal courts, construing Tennessee statutes, that they are valid.

241 Swann *vs.* Swann, 21 Fed. Rep. 299, citing,

Amis *vs*, Kyle, 2 Yer. 31.

Also notes to Shannon's Code, sec. 3029.

As applied to newspaper publication, which can be regarded as process, they are held void, just as any other judicial proceeding on Sunday is invalid, under the rule, both at common law and by statute above stated, that Sunday is *dies non juridicus*.

17 Encl. Pl. and Pr. p. 102.

The leading case cited here in support of this text is.

Schwed *vs.* Hartqitz, 22 Colo. 187.

Same case, 58 Am. St. Rep. 221.

This holds that the publication of a notice of a tax sale is in the nature of service of process, and if it takes place in a Sunday edition of a newspaper it is void. The same holding upon the same ground

is made in the case of Sawyer *vs.* Cargille, 72 Ga. 290, which is another tax-sale case. See note, to 24 Encl. Law, 577.

But no other notice or publication made on Sunday, unless specially prohibited by statute is void.

"In Hastings *vs.* Columbus, 42 Ohio St. Rep. 585, it is held that the publication of preliminary and other ordinances of street improvement, which were required to be made in a newspaper of general circulation, may be made in a paper published only on Sunday." This case is directly in point.

"Where there is a stipulation between private parties that notice shall be given by publication of ten days, publication on Sunday may be counted."

Kingsbury *vs.* Buckner, 71 Ill. 514, cited in note 1 to 24 Encl. Law, 1st ed. p. 577.

"In South Carolina, it is held that notice of escheat is not a process, such as is meant that Sunday is *dies non*, nor when published in a newspaper on that day, is it served on that day. The statute forbidding the service of civil process on Sunday does not make such process void."

Eason *vs.* Wilcofskey, 29 S. C. 239. Cited in note to 24 Encl.
242 Law, (1st ed.) p. 575.

"Notice to a consignee, given on Sunday, of the arrival of a cargo, is valid."

Lake *vs.* Hurd, 38 Conn. 540.

"And notice to quit, is not invalid, because given on Sunday."

Sangster *vs.* Noy, 16 L. T. (N. S.) 157.
24 Encl. Law, (1st ed.) 579.

"So too an enlistment made on Sunday is valid."

Walton *vs.* Garvin, 16 Q. B. 48.

"And in Tennessee it has been held that the acknowledgement of a deed made on Sunday is valid."

Lucas *vs.* Larkin, 1 Pickle, 355.

This was a case of the privy examination of a married woman to her deed, taken on Sunday. The court says: "Nor is the acknowledgement void because taken on Sunday. We are referred to a Wisconsin case, assumed by counsel to decide the contrary. Defort *vs.* W. & M. R. R. Co., 52 Wis. 320. Whatever may have been held in Wisconsin upon a statute making it unlawful to do any manner of labor, business or work on Sunday, except only works of necessity and of charity, or in any other State, upon statutes similar to our own, as was this one, or upon statutes similar to ours, our court has held that a contract executed on Sunday was not void for that reason alone; and we have likewise held that a writ issued on Sunday was not void; and we hold in this case that the acknowledgement of Mrs. Jarkin was not void because taken on Sunday."

1 Pickle, 356.

The validity or invalidity of an act done upon Sunday does not rest upon religious or moral grounds, or upon public policy but solely upon the question as to whether it violates the provisions of the law, either statutory or common.

Swann *vs.* Swann, 21 Fed. Rep. 299.
Mosely *vs.* Nanhooser, 6 Lea, 286.

It is the purpose of a publication of an ordinance like that in question to bring it to the attention of the public, and it is
243 clear that the publication in a Sunday newspaper is the most effective notice that could be given in the city of Knoxville. If it accomplishes the very purpose intended by the requirement to publish the act, and there is neither public policy or forbidding statute to be contravened by the act of publication, it seems that no ground could be suggested why this publication is not good.

III.

It is further objected to this ordinance that it was passed on its first and third readings at special or called meetings of the city council, at which one of the aldermen was not present and of which he was not notified.

The lower court sustained this objection, and held that the ordinance was on that account invalid.

The facts pertaining to this issue are as follows: In passing the ordinance of July 27, 1900, fixing water rates, the words, "per annum" had been omitted from the schedule fixing the rates. This had just been discovered, and it was necessary to remedy the defect.

By the rules and regulations of the water company "all bills due the company are payable at its office, those for regular water rates, quarterly and in advance, on the 1st days of January, April, July and October; all other bills for water, labor and materials at the time of their contraction." It was important to put this amendment in effect before April 1st, in order to meet and regulate the payments for the next quarter beginning on that date.

The regular meetings of the city council were on the first and hird Fridays in each month, and in March occurred on the 1st and 15th.

The charter of Knoxville, (act 1885, special session, ch. 8. sec. 9.) provides, "that no bill or ordinance shall become a law without first having been read and passed at three several meetings by a majority vote, and at the third of which readings a majority of the whole number of the members of the board shall be required."

244 To put this amended ordinance in effect by April 1st it was necessary to pass it on two readings at special meetings It was accordingly passed on its first and third readings at special meetings, called on March 9th and March 30, and on its second reading at the regular meeting on March 15.

Of these two special meetings Alderman Cleage, of the 6th ward, had no notice and was not present. For two and a half years previous to that date, Cleage had been and still was claim agent for the Southern Railway Company, with headquarters at Asheville N. C.,

assigned to duty on 500 miles of road in the States of North Carolina and South Carolina. His duties required his personal attention at all points in his territory, where claims for damages arose against his road, to investigate report and settle such claim. During February and March, 1901, he was unusually busy; had many claims for damages for fires, over various parts of his territory, and was constantly engaged in investigating, reporting and settling the same. On March 9th and 30th, as well as during all that month, he was engaged in his work somewhere in his territory, out of this State. It was impracticable to have reached him with personal notice of those meetings, and if he had had notice thereof, it was impracticable for him to have attended. He was in favor of the ordinance, had voted for the one of July 27, 1900, and had he been present at these meetings, would have voted for the ordinance in question.

The ordinance passed all of these readings by unanimous vote of all aldermen present, there being more than quorum present at each meeting.

In calling special meetings of the city council, it had long been the custom and practice in Knoxville to summon all aldermen who were to be found in the city, and not to notify those who were out of the city. All aldermen, including Alderman Cleage, knew of the custom and practice.

By the charter of the city, section 5, it is provided "It shall
245 require a majority of the members of the board to form a quorum for the transaction of business."

By section 9, it is provided that he (the mayor) may *whenever in his judgment the good of the city requires it*, call special meetings of the board of aldermen, and when so called he shall state by message the object for which it shall have been called, and the business of such meeting shall be restricted to the business so stated."

There is no provision, by charter, as to what notice shall be given of such meetings.

This charter also provides, by section 30 *et seq.* for a board of public works, composed of three members, and by section 34 it is provided that "said board shall hold regular meetings at least once a week, and as much oftener as the business intrusted to its care shall require, and two members of saod board shall constitute a quorum for the transaction of business. * * * Said meetings shall be held at stated times, and no called meetings shall be held until notice of the called meeting shall have been given by the recorder to each member, and no business shall be done at any called meeting, unless such notice shall be given."

The fact of this provision in this charter in regard to notice of special meetings of this board, and the absence of any provision on that subject as to the special meetings of the board of mayor and aldermen, is significant.

Upon these facts arises the question of law as to whether the passage of this ordinance was invalidated by failure to notify Alderman Cleage of these special meetings.

The general rule is that every member of a municipal council is

entitled to reasonable notice of special meetings, and that no important action can lawfully be done by such meeting unless such notice has been given, or unless the members not notified, actually attend and participate in the business of the meeting.

Land Co. *vs.* Jellico, 19 Pickle, 321.

But there are exceptions to this general rule recognized by
246 many good authorities, and we insist that the facts in this case bring us within one or more of these exceptions.

The general rule, in the case cited above, is stated more rigidly than usual. It is usually stated thus:

Notice of a regular meeting, time and place of which is fixed by charter or by law, is not necessary.

But if the meeting be a special one, the general rule, unless modified by charter or statute, is that notice is necessary and must be personally served, *if practicable*, upon every member to be present, so that each one may be afforded an opportunity to participate and vote.

1 Dillon on Mun. Corp. sec. 286.
1 Beach on Pub. Corp. sec. 271.
15 Encl. Law (1st ed.) pp. 1034–1035.

The same rule as to notice is applicable to directors' meetings of private corporations.

1 Thompsons on Corp. sec. 707–'8.
11 Cook on Corp. sec. 596.

So also with regard to the meeting of inferior municipal boards or commissions, composed of more than one member.

This requirement of notice, as stated in the general rule above, is qualified to this extent, *that its personal service on all the members of the corporations is practicable.*

In regard to inferior municipal boards, "where a member of such board is *absent from the State and beyond the reach of actual notice*, such notice is not necessary."

State *vs.* Kirk, 46 Conn. 395. Cited in 15 Encl. Law (1st ed.) page 1031.
11 Cook on Corp. sec. 1119.

Note *three* to the above section of Cook on Corporations, cites the following case:

Porter *vs.* Robinson, 30 Hun. 209 (1883).

"It is here held that notice need not be given to a member of school trustees, the board being a body corporate, *who is absent from the State, and cannot attend the meeting, and that the failure to notify such a member will not render the proceedings of the meeting irregular or invalid.*

247 "Members of English print stock companies residing abroad are not entitled to any notice of corporate meetings."

Ex parte Union Hill Silver Co. 22 L. T. Rep. 400 (1870).

In regard to the English municipal acts, Mr. Dillon, after stating that the same rule prevails as to notice of special meetings as above

stated, says "All, *if practicable*, must be served, but if the party entitled to notice has entirely quit the municipality, and has no family or house within its limits, notice is not necessary."

1 Dillon Mun. Corp. sec. 263.

In the case of private corporations it has been repeatedly held *that the absence of a director from the State is a* sufficient excuse for not giving him notice of the corporate meetings, and the failure to give such notice will not *invalidate the proceedings of a quorum acting in his absence.*"

See 5 Thompson Corp. secs. 6176, 6479 and note 2.

3 Thompson Corp. sec. 3936.

Here, after stating the rule regarding personal notice of special meetings being necessary to all members of the corporation, he adds: "*All this, proceeds upon the presumption that it is practicable to give notice and it has accordingly been held that the action of the majority is not invalidated because absent directors out of the State failed to receive notice of the meeting.*"

In section 6176, in discussing the question of the power of a corporation to execute a mortgage, he says in regard to this question of notice: "In a recent case where a corporate mortgage was challenged on the ground that its directors had not been duly notified, it was conceded by the objecting counsel that a director cannot put a stop to corporate business by simply leaving its jurisdiction, and that if after a reasonable search the parties are unable to find him, the remaining directors may attend to the necessary affairs, and this concession was quoted with approval by the court."

In section 6479, he says "Such an assignment (made by the corporation) is not invalid for the want of actual notice to
248 the absent directors, if they at the time were absent from the State, and they were notified by telegrams sent to their respective addresses within the State, though such telegrams were not received by them. The reason is that a rule that would require actual notice to be communicated to such of the members as had departed from the State in order to the validity of such an assignment, would be a perilous rule, for in such cases the exigencies may require immediate action to save the property or prevent expense."

In the case of Chase *vs.* Tuttle, 55 Conn. 455, reported also in 3 Am. St. Reps. p. 64, we find the following language used by the court: "We do not think the assignment invalid for want of actual notice to the two directors who were at the time absent from the State. Notice was sent by telegram to them as to the others, at their addresses in this State, but one being in the Territory of Montana, and the other in South Carolina, they failed to receive the notices. Under these circumstances, it would seem unreasonable to hold that a majority of the whole number being present, could not do a legal act binding the corporation. The exigency demanded immediate action to save the property and to save expense. It is easy to see how disastrous might be the consequences were we to adopt the principle contended for by the defendants. The situation of the

absent directors might be much more remote and inaccessible than in the present case, requiring several months to reach them by actual notice. Must the corporation remain paralyzed all the time, without ability to protect itself?"

In regard to this case, we remark that the general rule requires notice, *personally served*, therefore notice by telegram undelivered was no better than if notice had been attempted.

In the next place we remark that the exigency or emergency referred to in these authorities serves more to illustrate and enforce the unreasonable rigidity of the general rule, if it is to be
249 applied without exception. If the exception is to be made in cases of an emergency only, who is to judge of that emergency? Must every special meeting without notice to all the members, be subjected to the tes- of a lawsuit, in order to determine the sufficiency of the emergency to justify its action?

If absence from the State or other fact exists, which renders the personal service of notice impracticable, the law will dispense with notice altogether, whether the notice be one of emergency or not. The test is not the emergency, but the impracticability of giving notice.

In the case now under consideration, the charter authorizes the mayor to call a special meeting of the board, *whenever in his judgment the good of the city requires* it. Who is to revise his judgment on this matter? If he is entitled to call such meeting, and the absence and inaccessibility of an alderman will excuse the failure of personal service of notice of one such meeting, it will certainly excuse it for all.

From note 3 to section 708 of Thompson on Corporations, we quote: "It was decided in the House of Lords in 1849 that where certain acts of a corporation are to be performed at a special meeting of the members of that corporation, all the persons entitled to be present thereat must be summoned *if they are within reasonable summoning distance*, and that the omission to summon any one entitled to be summoned, renders the act done at such meeting invalid. Thus the election of a treasurer for the county of the city of Dublin, was vested by statute in the board of magistrates of the said city, and was directed to take place at the sessions court of the city by vote of the magistrates there present. It was held by the lords that the recorder of Dublin was a member of that board, that he ought to have been summoned to a meeting of the magistrates summoned for that election, and that the omission to summon him rendered the election which took place in his absence invalid. Smyth *vs.* Darley, 2 H.L. Cases, 789. A finding in a special verdict that a person entitled to be present at a meeting of the corporate body was not sum-
250 moned, and that he was *at the time within summoning distance, throws on the party supporting the validity of the acts done at such meeting, the onus of showing sufficient cause for his not being summoned.* Id."

Clark on Corporations, at page 491, thus states the rule: "To constitute a valid directors' meeting all of the directors must have notice of the time and place of meeting, unless the meeting is a stated

one, so that each one of them is chargeable with notice, or *unless a less number than all are made a quorum, and given power to transact business* * * * "*If by the charter of a corporation a certain number of directors are made a quorum, and given power to transact business, the corporation is bound by the unanimous concurrence of that number at a casual meeting, and without notice to the others*, unless notice is espressly required by the charter or by-laws."

Citing Edgerly *vs.* Emerson, 23 N. H. 555.
State *vs.* Smith, 48 Vt. 266.
Chase *vs.* Tuttle, 55 Conn. 455, 12 Atl. R. 874.

In the case of Edgerly *vs.* Emerson, above cited, reported also in 55 Am. Dec. 207, the court, after recognizing and stating the general rule on this subject, says:

"There are, however, many cases where an authority is granted to a board, or to several persons, or a majority of them, or a certain limited number, either more or less than a *majority, who are thereby constituted a quorum.* Thus in the usual form of bank charters there is a provisions that no less that four directors shall constitute a board for the transaction of business, of whom the president shall be one, except in case of sickness, or necessary absence, in which case the directors present may choose a chairman for the time being in his stead." The effect of this clause we deem the same as a provision that the directors, or any four of them, shall be competent to transact any business of the bank. Four constitutes a quorum, and when assembled, possess all the powers of the entire board.

"The position of the directors in such a case must be closely
251 like that of the selection of the selectment of a town, of whom a majority are by statute made competent to act in all cases.

"It has never been supposed, so far as we are aware, that it is necessary that selectment should have stated, meetings for the transaction of business, though it is perhaps usually done, as a matter of convenience, nor that the whole must be present, or notified, in order to enable the majority to act. On the contrary we conceive that the very object of the statute giving power to a majority of the selectmen, or making a certain number a quorum, was designed to obviate the strict requirement of the common law that all business must be done either at stated meetings or that all must be notified. In managing the prudential affairs of towns, and in the transactions of business corporations, many things are required and determined to be done, and determined at times when there could be no stated meetings and when it might be difficult to procure the attendance, or even to notify all the members of a board. *There was before no difficulty, except as to this point of notice* and the only useful effect of the statute provisions relating to a quorum, or the powers of a majority, is to give them the authority to act in the absence of others, and without notice to them."

This case is very pertinent to the one in hand, since the charter of Knoxville expressly provides that a majority of the members of the board shall form a quorum for the transaction of business.

Under these authorities it is clear that there must be exceptions to

this general rule requiring notice to all members of a corporation of special meetings; otherwise that rule would be, in many instances, wholly unreasonable and harsh in its operations.

Exactly what will constitute an exception to the rule, and will excuse the want of notice, may be hard to determine. All of these au*ht*orities *recognize absence from the State* as being sufficient.

252 The House of Lords prescribed *a reasonable summoning distance as the test*, while some of the other au*ht*orities indicate, in cases of meetings of municipal councils, that a member must be *within the municipality* to entitle him to notice. We believe the last to be a safe and reasonable rule as to municipal boards. The State limit is adopted chiefly with regard to private corporations, whose jurisdiction or field of operation may, and usually is, confined to the limits of the State, and with reference to them there is no requirement, that their stockholders or directors shall live within any particular restricted territory. It is different, however, with regard to municipal corporations. They are restricted in their jurisdictions to a very limited territory, and it is required that all members of such a corporation shall reside within its limits.

Our own statutes indicate the policy of our law on this subject. All officers shall reside in the State.

Shannon's Code sec. 1071.

Justices and constables vacate their offices by a removal from their districts.

Shannon's Code, sec. 433, 490.

Under the general law for the creation of municipalities aldermen are required to be residents of the city.

Idem, sec. 1953.

An alderman removing from his ward vacates his office.

Idem, sec. 1943.

Under the charter of the city of Knoxville, section 3, it is provided, that "No person shall be eligible to the office of mayor and alderman who is not a citizen of the State of Tennessee, and who has not been a resident of said city for at least two years immediately preceding his election, and should either cease to be a resident, his office shall thereby be vacated." And it is further provided by the same section that, "the office of any alderman removing from his ward shall be at once vacated."

253 This provision certainly contemplates the presence and location of every member of the city council in the city of Knoxville. In view of the facts in Alderman Cleage's case, and of these statutes, the least that can be said is that his continued absence from the State, and his accepting permanent employment beyond the limits of the State, will excuse the city authorities from serving him personally, at that distance, with notice of all special meetings of the board, otherwise his membership of this board will require it to dispense with special meetings, or impose upon it unusual and unreasonable burdens and expense of thus notifying him. It

will be observed that notice by mail or telegram is not provided for by this general rule, but notice to be personally served.

It has long been the custom in Knoxville to give notice of special meetings of the board only to those members who were to be found in the city. We believe that this custom has conformed to the reasonable rule of law to be prescribed in such case. Much will depend upon custom and usage, says Angel and Ames on Corporations, sec. 455–'6.

The adoption of a contrary rule would certainly be revolutionary in the municipal affairs of the city of Knoxville, and would most probably invalidate much of its most important legislation. But we need not insist on this limitation of the rule in this case, as Cleage was not only without the municipality, but beyond the limits and jurisdiction of the State.

An examination of the record in the case of Land Co. *vs.* Jellico, 19 Pickle 320, discloses the fact that the alderman who was not notified was in the building where the meeting was held, and must have been purposely omitted from the notice of the meeting. It appears too, that the absent alderman was hostile to the ordinance.

The meeting was, moreover, held at the instance of the party seeking the benefit of the ordinance. That was an ordinance fixing a burden upon the people. In all these respects that case is distinguished from the case at bar. The provision of the Jellico charter as to quorum does not appear.

254 So also an examination of the cases cited in the opinion in that case, so far as we have had access to them, discloses the fact that the aldermen or directors, as the case may be, of the several corporations were within the town or the State and within reach of notice. We have been unable to find any case where the absent and unnotified alderman or director was without the State or beyond the reach of personal notice, where the action has been held invalid for want of notice to such member of the corporation.

Some question is made by the defendant in this case as to the sufficiency of the notice given of the meeting of March 9, 1901, of the city council, in that it fails to state the place of meeting. This is utterly immaterial in this controversy, because all aldermen, except Cleage, who were entitled to notice, were present at the meeting, and as to Cleage, there was no notice whatever. Unless this particular notice had been served upon him, no question can be made as to its sufficiency. In other words, we have simply the case of no notice whatever, and the question as to whether any notice was necessary or altogether excused as to him.

IV.

But objections II and III to said ordinance above set forth are precluded by the written statements in the form of pleas objecting to said ordinance, which are filed by defendant's counsel, and upon which issue was taken on the trial in the circuit court. These statements and the issues thereon had the effect to narrow the contest upon this ordinance.

Utley *vs.* R. R. 22 Pickle, 242.

The case at bar is a stronger one than the case cited. In the case cited, counsel were held to have narrowed the issues by making an oral statement at the request of the court. In this case, counsel, without any request of the court or suggestion of opposing counsel, and in a case where pleadings were not required, took it upon himself to make specific, by written statement, his objections to
255 the ordinance, not embracing these two objections. Having thus given written notice, which was accepted by the opposite party, of the specific issues to be made upon this ordinance, counsel cannot be permitted now to go beyond the issues thus made.

There are a number of other minor questions made in this case, which are noticed in our assignment of errors filed herein, and we refer to it for a statement and discussion thereof, but do not deem them of sufficient importance to discuss them in this printed brief.

We respectfully insist that the circuit court erred in declaring the ordinance in question invalid, and dismissing plaintiff's suit.

R. L. CATES, *City Attorney.*
PICKLE & TURNER,
Counsel for Plaintiff.

256 (*Printed Brief for Def't.*)

No. 24.

Law Cause, Knox County.

In the Supreme Court at Knoxville, Tennessee, September Term, 1901.

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE, Plaintiff in Error,
vs.
KNOXVILLE WATER COMPANY, Defendant in Error.

Brief for Defendant in Error by Chas. T. Cates, Jr., Attorney.

Filed Oct. 8, 1901.

J. G. STUART, *D. C.*

In the Supreme Court at Knoxville, Tenn., September Term, 1901.

MAYOR & ALDERMEN OF THE CITY OF Knoxville, Plaintiff in Error,
vs.
KNOXVILLE WATER COMPANY, Defendant in Error.
} Law Cause No. 24, Knox County.

Brief and argument in support of the reply of the defendant in error, Knoxville Water Company, to the assignments of error made by the plaintiff in error, City of Knoxville.

257 This suit was instituted in the 1st day of May, 1901, by the plaintiff in error, a munic-pal corporation by warrant issued by its recorder against the defendant, a private corpora-

tion, seeking to collect a penalty of "not less than $10.00 nore more than $50.00," for charging and collecting of one W. K. McClure, for water furnished and to be furnished him by the defendant water company more than the rates prescribed by the ordinance of said city, passed and approved, March 30th, 1901.

The defendant was "arrested" and brought before said recorder and by him fined $50.00, *and committed tto the workhouse of Knox county* in the event said fine was not paid or secured. From this judgment and sentence defendant appealed to the circuit court of Knox county.

Tr. pp. 2 & 3.

In the circuit court, defendant moved to quash the recorder's warrant, because

1st. Said warrant does not set forth and aver any such state of facts, which, if admitted to be true, would entitle plaintiff to a judgment against this defendant.

2nd. Said warrant does not set forth the ordinance, or the substance thereof, which it is alleged has been violated by defendant, so that the court may see and determine whether plaintiff hath a right of action under it.

3rd. Said warrant fails to show, but should set forth, and aver, the substance of the ordinance upon which said warrant is based, and the particulars wherein it is claimed defendant hath violated said ordinance.

Defendant's motion to quash was overruled by the court. To the action of the court defendant excepted.

Tr. p. 28.

This was error against defendant. The motion should have been sustained and the warrant quashed. The ordinance either *in hæc verba*, or in substance, should have been set forth in the warrant, because like any other fact, it must be pleaded, for the court will not take judicial knowledge of it.

State *vs.* Crinkshank (Vt.) 42 Atlantic Rep. 983.

Shanfelter *vs.* City of Baltimore, 31 Atl. Rep. 539.

258 Thereupon after its motion to quash had been overruled, defendant filed six pleas, upon all of which plaintiff joined issued.

These pleas are in substance as follows:

1st. Not guilty.

2nd. That the ordinance upon which the suit is based is void, because it violates the Constitution of the United States in that it impairs the obligations of certain contracts existing between plaintiff in error and defendant in error and binding on both, and which contracts authorize and empower defendant in error to charge in the operation of its business, the reasonable and just schedule of rates and charges therein set forth.

Said contracts are filed with and made a part of said pleas.

Tr. pp. 2, 8 to 26.

3rd. That said ordinance is oppressive and unreasonable in that.

1st. Under and by said contracts, filed with and made a part of the 2nd plea, the plaintiff has an option to buy all the plant and property of defendant upon an appraised valuation, taking into consideration all the rights, privileges, franchises, easements, and other property of defendant in error, including the right to charge and collect from its consumers the just and reasonable schedule of rates provided in and constituting a material part of said contracts, and plaintiff by said ordinance seeks to and does depreciate the value of defendant's property, to the end that it may acquire and purchase same below and under its real value.

(2nd.) Said ordinance arbitrarily reduces the just and reasonable prices which plaintiff under and by said contracts agreed to pay defendant for water furnished by defendant to plaintiff.

(3rd.) That it prevents defendant from entering into contracts and agreements with its customers for the reasonable and just
259 prices, for water sold and furnished them by defendant.

(4th.) That by said ordinance defendant will be deprived of its property and liberty without due process of law.

Tr. pp. 4, 5, & 6.

4th. That said ordinance interferes with and impairs the contracts existing between defendant and its customers, whereby they had agreed to pay defendant for water furnished them, the reasonable and just prices provided by said contracts.

5th. That the penalty prescribed by said ordinance is excessive.

6th. *Nil debit.*

The plaintiff had demanded a jury for trial of this cause but subsequently waived that demand and in lieu thereof demanded that on the trial by the court, the court make a written finding of fact and law.

Tr. p. 28.

In compliance with demand of plaintiff, the trial judge after the evidence had been heard, made and filed his written findings of facts and conclusions of law, which are found in the record from pages 185 to 194, inclusive, and are not here set forth, but will be referred to whenever necessary for the purposes of this argument.

The trial judge held that plaintiff's ordinance of March 30th, 1901, upon which this suit is based, was invalid because passed on two of its readings *on* special meetings of the city council, which were illegal, for the reason that notice of said special meetings had not been given to all the aldermen. And therefore judgment was rendered against plaintiff.

Tr. p. 29.

And the plaintiff has appealed in error to this court and seeks a reversal of said judgments for the reasons set forth in its assignments of error, to be hereafter noticed in their proper and logical order.

Material Facts.

The plaintiff in error is a municipal corporation, and in 1882 it had in substance the same power to provide itself and its in-
260 habitants with a supply of water as set forth in its present charter, granted by the legislature in 1885, and found in subsection "7" of section "18" as follows:

"SECTION 18. The mayor and aldermen of Knoxville shall have the following power:— * * *

SUBSECTION 7. To provide the city with water by water works within or beyond the boundaries of the city, or provide for supplying the city with water otherwise, and to provide for the prevention and extinction of fires, and to organize and establish fire companies."

Under this authority, it was fully competent for the city to contract with the defendant company for a supply of water for itself and its inhabitants.

29th Amer. & Eng. Encl. Law. (1st ed.) p. 3.
15th Amer. & Eng. Ency. Law. (1st ed.) pp. 1115 1128.

On the 4th day of January, 1882, (Tr. p. 89) Peter Staub, John M. Brooks, Joseph T. McTeer, and their associates, as incorporators, after leave of the city had been obtained, procured the charter of the Knoxville Water Company, under the Acts of the General Assembly of 1877, chapter, 104.

Tr. pp. 83 to 89.

We call the attention of this court to those provisions of said charter which are material to the present case.

1st. The business of said company shall be to establish and construct water works in or near the city of Knoxville, Tennessee, and it shall be the duty of said company to build furnish and equip water works of sufficient capacity to furnish the corporate authorities and inhabitants of said city with water.

2nd. Said company shall have power * * * to contract with said inhabitants and with the corporate authorities of said city or any incorporated companies for the use of said water, and charge such price as may be agreed upon between said company and said parties.

3rd. Nothing in this charter contained shall be construed
261 to compel the inhabitants of said city to use the water of defendant company, or to prevent them from obtaining water obtained in another way.

Vide char. Tr. pp. 83, 84, 86.
Acts of 1877, chap. 104, sec. 1.

The 2nd section of said chapter 104 of the Acts of 1877, as printed in the pamphlet acts of that year, is as follows:

"SECTION 2. Be it further enacted. That such charter shall not be grantaed until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the

city, town or village, in which it is proposed to operate such water works, and such leave shall be certified by a mayor or recorder, upon the application and registered with it. And this act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by such company."

"Leave of corporation."

Under and by virtue of the authority conferred upon plaintiff as hereinbefore shown, and the power and authority conferred upon the defendant company by its charter, as shown, the plaintiff and defendant, on the first day of July, 1882 entered into a contract to cover the period of thirty years from the first day of August, 1883, and the provisions of said contract material to this case, are in substance as follows:

1st. To erect and establish, upon land to be purchased from the city at a price therein stipulated a system of water works sufficient to supply said city and its inhabitants with water, to be taken from the Tennessee river at the site purchased by the city for that purpose.

2nd. To erect at points designated by the city in said contract, seventy-five fire-hydrants, and afterwards, as many fire hydrants as the city might order.

262 3rd. To furnish free of charge to the city, water for flushing its streets and gutters, and for all purposes of the fire department, the city hall building and offices, and prisons therein.

4th. *To supply private consumers with water at a rate not to exceed five cents per one hundred gallons*, provided, however, that the entire cost of introducing from the mains into private premises, including the cost of meter when used, shall be borne by the party introducing or ordering the same.

5th. To maintain said water works, reservoir, pipes, mains, hydrants, machinery, etc., necessary to operate the same for the contract period of thirty years.

5th. Not to issue in excess of $150,000.00 bonds upon its property.

The city agreed:

1st. To give and did give a franchise in all of its streets and public thoroughfares, for the purpose of laying down the mains and pipes of defendant company.

2nd. To pay $50.00 per annum for each and all of the fire-hydrants, erected and to be erected under said contract.

NOTE.—By an agreement between plaintiff and defendant on February 9th, 1888, it was agreed that the city should thereafter pay $50.00 per annum for each fire-hydrant up to one hundred and $45.00 per annum for all hydrants in excess of one hundred. Tr. p. 77.

It was mutually agreed between plaintiff and defendant that at the expiration of fifteen years from the 1st day of August, 1883, the

city should have the right to purchase from defendant company the water works and all the property, rights franchises, provided in and growing out of said contracts, the terms to be agreed upon, or if not, then at any time for a consideration to be fixed and determined by five appraisers, two of whom were to be selected by the city, two by defendant company and the fifth by these four, all of whom shall be non-residents of the city of Knoxville and county of Knox, who are to value and appraise the water works, and all rights, franchises, privileges and easements and other property ap-
263 purtenant thereto; and the award of the appraisers, or a majority thereof, it was provided, should be final and conclusive upon both parties.

This contract was upheld in all of its material features by this court at its September term, 1887, and indeed there is no controversy as to its validity.

At the time this contract was entered into, the city of Knoxville was comprised of its first nine wards as it now exists and the plant and property of defendant company in these nine wards were built in pursuance of this contract of July 1st, 1882.

Transcript p. 186.

Subsequently on April 18th, 1901, the town of North Knoxville, then a corporate municipality contingent to the city of Knoxville, entered into a contract with Wheeler & Parks, to supply said town and its inhabitants with water, and by section 9 of said contract it was provided as follows: "Water to be furnished private consumers shall be charged for at not exceeding the rates contained in the following schedule," which are then set out in detail.

Tr. pp. 119, 122.

This contract was, on November 17th, 1893, assigned by Wheeler & Parks to defendant company.

Tr. pp. 129, 132.

In 1891, the Lonsdale-Beaumont Water Company, was chartered under the Acts of 1885, chapter 115, for the purpose of supplying water to the town of West Knoxville, which was another separate municipality, contiguous to the city of Knoxville.

Tr. pp. 94 & 101.

It is stated in the brief filed on behalf of plaintiff in error that the charter of the Lonsdale-Beaumont Water Company was under the Acts of 1877, chapter 104, and 1885 chapter 115, but this is erroneous, because it is evident from said charter (Tr. pp. 94, 101) that it was granted under the act of 1885.

On September 17th, 1892, the town of West Knoxville and the Lonsdale-Beaumont Water Company entered into a twenty-year contract under and by which the Lonsdale-Beaumont Water
264 Company agreed to erect and build a system of water works sufficient to supply said town and its inhabitants with water, and by section XI it was provided that: The grantee "shall not charge consumers during the continuance of the franchise granted

by this ordinance exceeding the following maximum annual rates," etc., and then sets out the schedule of the rates.

Tr. pp. 102, 110, 112.

The power and authority vested in the town- of North and West Knoxville in regard to water supply, are set forth in their charters in identically the same language.

"To provide the town with water works, or contract with others for water within or beyond the town limits, for town or corporate purposes."

Acts of 1889, ch. 28, sec. 4 ss. 7.
Acts of 1889 ch. 93, sec. 5 ss. 7.

By chapter 323 of the Acts of the General Assembly of 1897, the city of Knoxville and the towns of West Knoxville and North Knoxville were consolidated and by section "8" of said act it was expressly provided that all contracts of the town- of West Knoxville and North Knoxville, shall be carried out and performed by the board of mayor & aldermen of the city of Knoxville, which was the name given to the consolidated municipality, which is the plaintiff in this case.

Previous to the consolidation of these three municipalities on April 1st, 1895, the Knoxville Water Company had voluntarily published, and put into operation a schedule of rayes and charges for the use of water, very much below the price stipulated in the contract of July 1st, 1882, in that the maximum charge for metered water was at the rate of two and a half cents per one hundred gallons, or twenty-five cents per thousand gallons, as against five cents per one hundred gallons, or fifty cents per thousand gallons, provided in said contract of July 1st, 1882; and further provided as the unit of charge, or as it is sometimes called, the fixture charge, an annual rate of $6.00 for a house containing four rooms or less.

These rates, with the rules and regulations appertaining
265 thereto, are found in the pamphlet filed with the record at page 145.

Subsequent to the publication of these rates and charges, and on the 17th day of May, 1895, the city of Knoxville passed an ordinance assuming to regulate the meter rates to be charged by defendant company, but in fact only adopting the meter rates then in force by defendant company.

Tr. p. 81.

By the act of consolidation, the town of West Knoxville, became the 10th ward, and the town of North Knoxville became the 11th ward of the city of Knoxville.

On the 20th day of October, 1899, the plaintiff, mayor and aldermen of the city of Knoxville, passed an ordinance granting its corporate consent and approval of the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company into one corporation under the name of the Knoxville Water Company, to be effected by consolidation, purchase, lease or otherwise, as may be deemed best by said consolidating companies but this consolida-

tion was granted upon certain express conditions reserved by the city, to wit:

1st. The rates provided by the Lonsdale-Beaumont contract of September 17th, 1892 are guaranteed to the inhabitants of the 10th ward, formerly the town of West Knoxville.

2nd. Filtered water to all the inhabitants of the city of Knoxville.

3rd. A continuance of the rates then in force by the Knoxville Water Company to all the inhabitants of the remaining wards, other than the 10th of the city of Knoxville.

4th. That the option and right to purchase reserved by the city in its contract of July 1st, 1882, with the Knoxville Water Company, and covering the property of the Knoxville Water Company, should extend to all the property of the Knoxville Water Company, which it then owned, or might afterwards acquire or which might be acquired by said consolidated company.

Then in order that the consolidation provided by said ordinance might be effected, and to enable the consolidating companies
266 to fund their existing debts and obligations, and to provide funds to improve the consolidated plant, and make extensions thereto, the city released defendant company from the bond limitation provided in the contract of July 1st, 1883, but provided that not more than $800,000.00 of bonds should be issued prior to the 1st day of January, 1901, and that no bonds in excess of $800,000.00 should be issued prior to the 1st day of January, 1901, and that no bonds in excess of $800,000.00 should be issued, except to provide funds for additions to or improvements of the plant and property of defendant company, and for any bonds so issued by defendant company, a sworn certificate showing the actual cost of such additions or improvements for which bonds may be issued. And it was further provided by said ordinance of October 20th, 1899, that it should take effect from and after its passage; that its publication should be paid for by the consolidating companies, and that within thirty days after said ordinance took effect, that said consolidating companies should file their several written acceptances of said ordinance "in so far as it alters or changes said contracts of September 17th, 1892, and of July 1st, 1882. * * * and thereupon this ordinance shall be and become a part of said contracts as fully as if the provisions of this ordinance were embraced in formally written contracts, made and executed between the City of Knoxville and the Lonsdale-Beaumont Water Company and the Knoxville Water Company." Said Lonsdale-Beaumont Water Company and the Knoxville Water Company, by their proper officials, duly filed their several acceptances of said ordinance on the same day it was passed, to wit: October 20, 1899.

Tr. pp. 21 to 22 inclusive.

On January 1st, 1900, the consolidation provided by the ordinance and contract of October 20th, 1899, was effected by a conveyance by the Lonsdale-Beaumont Water Company, of all its property, franchises, contracts, etc., to the Knoxville Water Company, and this conveyance was duly recorded in the office of the secretary of state, as provided, by law.

Tr. pp. 133 to 139.

267 On July 27, 1900, and less than a year after the execution of the contract and passage of the ordinance of October 20th, 1899, the city attempted to pass an ordinance regulating water rates and charges to be enforced by this defendant, but this ordinance is conceded by defendant to have been defective. Its introduction as evidence was objected to by defendant, but it was admitted over defendant's objection; and thereupon an exception was reserved.

Tr. pp. 73, 174, 179.

On March 30th, 1901, the city of Knoxville passed and approved the ordinance in controversy in this suit, specifying a maximum rate to be charged to consumers by any firm or corporation in the city of Knoxville, and providing a high penalty for a violation of its terms and provisions as set forth in its 3rd section, to wit:

"SECTION 3. *Be it further ordained:* That it shall be unlawful for any person, company, firm or corporation, or their officers, agents, servants, or employés, supplying water to the inhabitants of the city of Knoxville, to charge, demand or collect for water so supplied more than the rates hereinbefore set forth in section 'I' of this ordinance; and it shall also be unlawful for any such person, firm or corporation or their officers agents, servants or employés to cut off or otherwise interfere with the supply, or refuse to furnish a supply of water to any consumer for failure to pay for same, provided such consumer tenders, in lawful money, the charge for such water at the rates aforesaid, and any violation of the provisions of this section of this ordinance shall be a misdemeanor, and upon a conviction thereof, before the recorder, the offender shall be punished by a fine of not less than $10.00 nor more than $50.00 for each offense."

The defendant continued to charge the rates provided in the contract and ordinance of October 20th, 1899, which (with the exception of some rates in the Lonsdale-Beaumont ordinance) were slightly in excess of the rates and charges provided in said ordinance
268 of March 30th, 1901; and thereupon this suit was instituted, and the defendant was charged with unlawfully charging, demanding and collecting of W. K. McClure, for water furnished and to be furnished him in the city of Knoxville, more than the rates fixed therefor by the ordinance of March 30th, 1901. The facts in regard to this charge are in brief as follows:

W. K. McClure lives in the 10th ward of the city of Knoxville, and the water furnished to him personally was paid under the Lonsdale-Beaumont contract, and was less than he would have had to pay under the ordinance of March 30th, 1901.

Tr. p. 193.

Said McClure was the agent for a man by the name of J. S. Gratz, who then lived in the city of Chicago, but was the owner of three houses and lots in the city of Knoxville, and outside of the 10th ward. In 1896, the defendant company made a contract with said Gratz to supply water to the premises owned by him, which said contract is as follows:

"Knoxville Water Company, service No. 2850.

KNOXVILLE, TENNESSEE, *Sept.* 17, 1896.

The undersigned, hereby, applies to the Knoxville Water Company for a supply of water at premises No. 706 High street, owned by J. S. Gratz, occupied by tenants, to be used for domestic purposes only, and I hereby agree to use and pay for the same in accordance with the rates, rules and regulations of the Knoxville Water Company as now, or hereafter in force, and which are made a part of this contract.

And I further agree that said company may enter upon any land owned by me, and in which I may have such right, and place therein, upon the terms provided therefor, all the pipes, that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require."

This contract was signed by J. S. Gratz by his agent W. K. McClure.

Tr. pp. 193, 194.

269 The water in controversy was furnished to tenants living in said property owned by said Gratz for whom said McClure was agent, and who, as such agent, represented the owner Gratz in renting the property, and the bills were rendered to W. K. McClure as agent, and paid by him in that capacity, but actually paid out of the funds belonging to the owner, J. S. Gratz, and the bills so rendered for said water were in accordance with the rates prescribed by said contract and ordinance of October 20th, 1899; the difference between the rates charged by defendant and paid by said Gratz, through McClure, for the three premises to which the water in controversy was furnished, and what would have been paid under the ordinance of March 30th, 1901, was $1.15, that is 50 cents, 42 cents and 23 cents respectively.

The charter of the city of Knoxville provides that no ordinance shall become a law without first having been read and passed at three several meetings, that is, at three several regular meetings of the board, or at three several regular meetings, or valid "call" or "special" meetings, which the mayor by said charter, is authorized to call. The regular meetings of the mayor and board of aldermen of the city of Knoxville, are on the first and third Friday nights of each month. The ordinance of March 30th, 1901, was passed on its first reading at a special meeting on March 9th, 1901; on its second reading, at a regular meeting on March 15th, 1901; and on its third and final reading, at a special meeting on March 30th, 1901. The mayor and eleven aldermen, that is one alderman for each ward, constitute the board of mayor & aldermen of the city of Knoxville. At the special meeting of March 9th, 1901, Alderman Cleage, representing the 6th ward, and Alderman Trigg, representing the 5th ward, were not present and were not notified, and no effort was made to notify them, nor did they have any notice or knowledge of said meeting. Alderman Trigg had removed from the city and notice to him was not necessary. Alderman Cleage was not present at the meet-

ing of March 30th, 1901, was not notified of that meeting, and had no knowledge thereof. When Alderman Cleage was elected an alderman for the 6th ward of the city of Knox-
270 ville, he was then as he was in March, 1901, residing with his mother on Broad street in the 6th ward of the city of Knoxville, but he was in the employ of the Southern railway, with headquarters principally at Asheville. He was active in the discharge of his duties as an alderman, attended nearly all of the regular meetings, and such special meetings as he had notice of, and was usually informed by telegram of special meetings, and had attended as many as three special meetings in one week, coming hundred- of miles so to do. No effort was made to notify Alderman Cleage of either of these special meetings.

Tr. pp. 190, 191, 162, 169, 170.

The trial judge found that it was practicable to have given Alderman Cleage notice of these special meetings, and that it was practicable for him to have attended the meeting of March 9th, 1901, and that no emergency existed for the passage of the ordinance in question at these special meetings.

Tr. pp. 191, '2, '3.

We call further attention of the court to the written calls for these special meetings in the following particulars:

1st. The mayor did not sign the call for the meeting of March 30th, 1901, but his name was signed thereto by J. J. Atkins, chief of police.

Tr. p. 154.

2nd. The notices given for both these special meetings were unreasonably short in that the call or notice for each meeting was issued some time during the same day for which they were called.

Tr. pp. 47, 50, 51.

3rd. The notice or call for the meeting of March 9th, 1901, does not state the place where said meeting was to be held.

Tr. pp. 51, 192.

In April, 1901, the defendant company had between 4,500 and 4,600 individual consumers, and of this number only 64 paid their water bills under the protest provided in the ordinance of March 30th, 1901.

271 Tr. p. 142

Defendant company has about 4000 individual consumers or patrons with whom it has contracts similar to the Gratz contract hereinbefore set out, and to whom defendant is furnishing water under the rates provided in the contract of October 20th 1899.

Tr. pp. 194, 141, 142.

Defendant company, at the time of the institution of this suit, was also furnishing water to the city of Knoxville, for other than

hydrant purposes at rates prescribed in the contract of October 20th, 1899.

Tr. pp. 141, 194.

Brief and Argument.

For convenience, and because we deem it first in logical order, we notice the 3rd assignment of error, and its various subdivisions, which relate to the written findings of the trial judge, and his rulings on the evidence. The substance of the 14 subdivisions into which the 3rd assignment is divided, may be reduced to the following propositions:

1st. It is insisted that the trial judge should have made his "finding of fact separate and distinct from his findings of law."

Technically, this is a correct statement of the rule, and we submit that the trial judge substantially complied with this rule, and the complaint that the trial judge confused his findings of facts and law, is not borne out by the findings.

Tr. pp. 185, 194.

The findings of the trial judge as to facts contained brief yet full statement of the ultimate and controlling facts in their chronological and logical order, and his conclusions of law are stated separately and distinct from his findings of fact. We submit that the criticism of counsel for plaintiff in error is exceedingly hypercritical.

272 2nd. It is insisted that the trial judge excluded certain testimony offered by the plaintiff in error, which was competent, and allowed other testimony, offered by the defendant in error, which was incompetent.

We respectfully refer the court to the reply of defendant in error to said 3rd assignment of plaintiff in error, on file in this cause, for full and complete answer to this complaint.

3rd. It is insisted that the court erred in certain of his findings of fact, because the weight of the testimony is against such findings.

We submit, that as shown in our reply, the various findings of the trial judge are amply supported by the evidence not only by *some material evidence*, but by the weight of the testimony. But it is sufficient in a case like this, tried by the judge without the intervention of a jury, if his written finding of facts is supported by *any material evidence*. This is the well-established rules in this court. His findings have the same weight as the verdict of a jury.

Etter *vs.* Richardson, 19 Tenn. 580.
Stanley *vs.* Donahoe, 16 Lea, 492.
Folwell *vs.* Ladd, 12 Heis. 464.
Mabry *vs.* Memphis, 12 Heis. 539.
State Ins. Co. *vs.* Hughes, 10 Lea, 462.
Smith *vs.* Hubbard, 85 Tenn. 306.

4th. It is insisted that the court erred in not finding as facts, certain matters specified in said assignment of error which is fully noted and replied to in the reply of defendant in error.

We submit:

(1.) That many of these alleged facts, if found, would be immaterial.

(2.) That in order to put the trial judge in error, because he failed to find the additional facts, it was necessary for the plaintiff in error to request such facts to be found, or in some way apply for rehearing on those points. We submit that the true rule is,
273 where the court fails to find specifically on all the material issues, the proper remedy is to apply to the court for further findings.

8 Am. & Eng. Enc. Pr. 944, 950.
Warner *vs.* Foot, 44 Minn. 176.
Aiken *vs.* McCarthy 2nd Wash. 112.

This is analagous to the practice in the court of chancery appeals of this State, whose duty it is, under the statute, to make a written finding of facts, and when such written finding of facts does not cover the whole case, and when other and additional facts are desired, they must be called for—by petition to rehear, if necessary.

Hall *vs.* Hale, 99 Tenn. 537.
Anderson Co. *vs.* Hayes, 99 Tenn. 515.

5th. Plaintiff in error insists that the trial judge erred in not finding as facts most every matter to which its witnesses testified:

But we submit, it was sufficient for him, as he did, to substantially comply with the statute, and to find only the *ultimate and controlling facts*, and not the evidence upon which they were based.

McHale *vs.* Wellman, 101 Tenn. 153.
8th Amer. and Eng. Enc. Pr. 934, 939, 940, 950.

The first assignment of error is not well taken.

The ordinance of March 30th, 1901, was void because of failure to notify all the members of the council, of the special meetings at which it was passed.

The facts in regard to the special meetings of March 9th and March 30th, 1901, have been hereinbefore fully set out, and there is no doubt but that Alderman Cleage was not only not notified of those meetings, but that no effort was made to notify him, and he did not attend either of them. The rule is that reasonable notice of both the time and place of special meetings of a municipal body, must be given to all the members of that body.

Land Co. *vs.* Jellico, 19 Pick. 320.

And this rule is supported by reasons of public policy, and
274 is upheld by an almost unbroken line of authorities.

1st Dill. Munc. Corp. sec. 263, 286.
Amer. & Eng. Ency. Law, pp. 1035, 1080, 1081.
1st Beech Pub. Corp. sec. 271.
Lord *vs.* Anoka, 36 Minn. 176.
Beaver Creek *vs.* Hastings, 56 Mich. 528.
Board of Supervisors *vs.* Horton, 75 Ia. 371.
Paola *vs.* Comm'rs, 16 Kas. 302.
People *vs.* Batchelor, 22 N. Y. 128.

Harding *vs.* Vandeter, 40 Cal. 77.
Stowe *vs.* Wise, 7 Conn. 214.
2nd Cooke on Cor. sec. 594, 596.
Medical Society *vs.* Weatherly, 75 Ala. 248.
Bank of Little Rock *vs.* McCarthy, 53 Ark. 473.
Wiggins *vs.* Free Will Baptist Ch. 8 Mass. 301.

The authorities cited by plaintiff in error in support of the first assignment of error are so variant from the principle contended for by plaintiff in error, that we are almost forced to the conclusions that counsel have made some mistake in their citations. The citation from Dillon on Municipal Corporations, from Cooke on Corporations, and from Clarke on Corporations, fully sustain the contention of defendant in error as to the rule above stated.

The case of State *vs.* Kirk, reported in 40 Conn., instead of being an authority for plaintiff in error, abundantly sustains the rule that it is imperative that every member of a municipal body have notice, and in that cause, the member of the municipal board being temporarily out of the State, written notice was left at his residence and place of business.

In section 6176 of Thompson on Corporations, and based upon the case Bank of Little Rock *vs.* McCarthy (*supra*) Mr. Thompson lays down an exception to the general rule, where a director or member of a municipal body is absent or absconding from the State and *cannot be located after a reasonable search* but he also says, that to excuse notice to all of the members (and it must be observed
275 that he was speaking in regard to a purely private corporation) there must be a concurrence of three conditions:

1st. Impracticability of notice.
2nd. The existence of an emergency for action.
3rd. Reasonable necessity for the action taken.

Now, even upon the theory and contention of plaintiff these conditions did exist on March 9th and March 30th, 1901, and we submit that the burden of establishing these conditions, is upon the plaintiff in error, it being clearly shown that the alderman was not notified, and that he was not present, and it being admitted by the mayor that it was not even attempted to give notice to Alderman Cleage. Further, in case of special meetings, it is necessary, not only that notice should be given but *reasonable notice* of the time and place of meeting must be given. It will be remembered that Alderman Cleage had attended many special meetings, being summoned thereto by telegram, and coming hundreds of miles to be present. But these calls for the meetings of March 9th and March 30th, 1901, were issued less than a day, in fact on the same day, and certainly within a few hours of the time for which the meeting was called. Further, the notice for the meeting of March 9th, 1901, does *not specify any place* at which the meeting was to be held.

In Paola Railroad *vs.* Commissioners, 16 Kas. 302, holding that the doings of a board of county commissioners, at a special meeting were invalid because all members were not notified, Mr. Justice Brewer, said:

"The statute providing for the sessions of the county board is found in section 13 page 256 of the General Statutes. That section after providing for the meeting of the board in regular session, adds: 'And any special session on the call of the chairman at the request of two members of the board and as often as the interests of the county may demand.' This is the only statutory provision on the subject. It does not specify whether the call shall be verbal, or in writing, how long prior to the meeting it shall be made, or requiring a record to be
276 preserved of it. And the same is true as to the request. But still it requires a 'call;' and a call of the meeting in the legal sense of the term is a summons to the parties to meet, directing them to meet. It involves something more than a mere purpose in the mind of the caller or an expression of that purpose unheard, unseen and unknown. It implies a communication of that purpose to the parties to be affected by it. How it shall be communicated is sometimes prescribed by the statute or by law. It is sometimes provided that it shall be by publication in the newspaper; sometimes by printed notice served personally or at the residence, and sometimes by mere oral personal service. But in some way or other notice must be given, and if there be no regulation as to the manner of notice it must be personal notice. This is no new question. It has arisen in respect to the common councils of cities, boards of directors or trustees of private corporations, the town meetings of New England, the meetings of most of corporations, boards of directors, etc. *And there is but one uniform rule running through the authorities.* In the case of Rex *vs.* Mayor etc. of Shrewsberry, Rep. Temp. Hard, 151, it was said by the court that 'when acts are to be done by a selected board notice must be given of the time of special meetings.' It was a saying of Lord Kenyon's that special notice must be given to every member who has a right to vote.

Chief Justice Tilghman, in the case of Baltimore Turnpike, 5 Benny, 481, said that, 'when several persons are authorized to do an act of a public nature, they must all be notified or convened.'

In Wilcox on municipal corporations, we find it laid down that all corporate affairs must be transacted as an assembly convened upon due notice at a proper time and place.

Dillon in his work on Municipal Corporations, secs. 262, 263, lays down the rule thus: 'If the meeting be a special one, the general rule is, unless modified by the charter or statute, that notice is necessary and must be personally served upon every member en-
277 titled to be present, so that each one may be afforded an opportunity to participate and vote.' Nor is this merely an arbitrary rule, but one founded upon the clearest dictates of reason and public policy. Any other rule would be fraught with danger to the rights of even a majority, as when legally convened, the rule in the absence of special restrictions being that a quorum can act, and a majority of the quorum and the body, it would, but for this rule, often be in the power of an unscrupulous minority, to bind both the body and corporation for which it acts for measures which neither approve of. Thus were the body composed of twelve members, a

quorum of seven could act, and a majority of four, by withholding notice to five, might thus bind both the body and the corporation. Reason therefore, and authority united in saying that notice to all the members is essential to a legal special session."

Again, all the directors, are entitled to notice, either express or implied of any meeting at which any business is transacted in order that the business may be binding upon all the persons concerned, admits of no question.. If the meetings held are regular meetings, that is, such as are provided by the charter or by-laws fixing time and place, then notice thereof, is implied. Of all other meetings, especially those at which any business not pertaining to the ordinary affairs of the corporation, is transacted, express notice must be given of the time, place and object or purpose of the meeting.

Whitehead *vs.* Hamilton Rubber Co. 52 N. J. Eq. 78 92.

A special meeting of directors is void if no notice is given the absent directors. If the board meeting be specially convened, the general rule is that notice must be served upon every member entitled to be present.

Hill *vs.* Rich Hill, 119 Mo. 9.

Pike Co. *vs.* Rowland, 94 Pa. St. 2.

In the case of People *vs.* Batchelor, 22 N. Y. 130, Mr. Justice Selden, speaking for the court, said:

278 "It is not only a plain dictate of reason, but a general rule of law that no power or function intrusted to a body consisting of a number of persons, can be legally exercised without notice to all the members composing such body."

Wilcox lays down this rule in respect to municipal corporations, as follows:

"All corporate affairs must be transacted at an assembly convened upon due notice at a proper time and place, consisting of a majority of the persons of each class to which the prescription or charter has confided the power."

In the case of Lord *vs.* City of Anoka, 36 Minn, 176, the supreme court of Minnesota, through Mr. Justice Berry, said:

"A special meeting of a city council is not valid unless called by the mayor by written notice to each member of the council delivered to him personally, or left at his usual place of abode, or unless all of the members, or at least all of the members not legally notified, are present at the meeting."

In the case of Beaver Creek *vs.* Hastings, (*supra*) the supreme court of the State of Michigan, said:

"The mere attendance of the quorum of the township board, no meeting being duly called and notified, is not legal, Every member has a right to notice, and to participate in the meeting."

In the case of Stowe *vs.* Wise, (*supra*) the supreme court of Connecticut, said:

"That where no method of giving notice is provided, by charter, or by-laws, personal notice must be given."

Plaintiff in error endeavors to support the failure to give Alder-

man Cleage notice, and any attempt to give him notice by an alleged usage or custom, but the testimony in regard to this was unquestionably incompetent, and moreover the authority cited to support this practice, not only does not give it support, but is positive authority against it.

In Angel & Ames on Corporations, secs. 492 and 494, it is laid down:

279 "Usage and custom will not justify either the lack of notice or unreasonable notice to members of a municipal corporation. In the case of absence, notice must be left with the member's family, or his place of abode. It is no sufficient reason for omitting to summon a member, that it was supposed that he was without the reach of summon, for to support the validity of corporate acts, each member must be actually summoned.

The publication of the ordinance in a Sunday newspaper on March 31*th*, 1901, was not a legal publication.

The ordinance in question was never published except in the Journal and Tribune on Sunday, the 31st of March, 1901. This, we submit, was not a legal and valid publication. Before said ordinance could become a valid and enforceable ordinance, and competent evidence in behalf of plaintiff in error, it must have been legally printed and published by the authority of the corporation.

Charter of the City of Knoxville, sec. 28.

Harr & Bennis Ordinances, sec. 52, 53.

Proper exception was made by defendant to the introduction of this ordinance, because it had never been legally published, but said objection was overruled by the court, and defendant excepted to this ruling.

In Ornsby *vs.* City of Louisville, 75 Ky. 197, 4 Amer. & Eng. Corp. Cas. 342, a city charter provided that ordinances required to be printed and published, "shall be so printed and published in at least two papers in said city of Louisville, having the largest *bona fide* circulation in said city," etc. Holding that publication in a Sunday newspaper was unauthorized the court, said:

"As the plaintiff should be allowed to amend on the return of the cause, it becomes necessary to decide several other questions raised upon the record, which we propose to do, A publication of the levy ordinances on Sunday, and on no other day, seeking to enforce them, is not such a publication as the charter requires, or the law of this State approves. It is not a judicial day, nor is it a day upon

280 which any work, labor or calling can be legally pursued, unless of necessity or charity. Legal process cannot ordinarily be legally served upon Sunday, and there is no reason shown why the publication of an ordinance of the city of Louisville on Sunday should be held as a compliance with its charter requiring publications of such ordinance. The publication is a violation of law, and no citizen is bound by any law known to us to read secular newspapers on Sunday to entitle himself to the benefits which may flow from publications contained in them. If he chooses he may refuse

to read them on Sunday altogether, and none of his legal rights will be thereby forfeited."

In Dumars *vs.* City of Denver, (Colo. 1901) 65 Pac. Rep. 580, it was held that under a provision in the Denver City charter that no ordinance shall take effect until published in some newspaper of general circulation, or in a book or pamphlet, one publication in a Sunday newspaper of an ordinance authorizing the construction of a sewer, was not sufficient publication to support an assessment therefore, since a Sunday publication was of no effect.

"The court gave the question a thorough consideration, with an apology for the space occupied in reviewing the authorities, viz: Hastings *vs.* City of Columbus, 42 Ohio St. 585, Ornsby *vs.* City of Louisville, 79 Ky. 191; Schwed *vs.* Hartwitz, 23 Colo. 187, and Scammon *vs.* City of Chicago, 40 Ill. 146, all of which cases are cited elsewhere in this brief:

In Sewall *vs.* City of St. Paul, 20 Minn. 541, a statute requiring that notice of application for confirmation of assessments for local improvements "shall be given by said board of commissiiners by six days' publication in the official paper of the city." The court said:

"The notice in this case was published in the official paper for six days only, one of which days was Sunday, and was one of the regular days of publication of said official paper. The statute means that the notice must be published on six different days, and these must be days upon which it was competent to make the pub-
281 lication. Sunday is not a business day. The publication upon that day, therefore, was invalid, and the notice required by the act not having been given, the confirmation of the assessment was void. Scammon *vs.* City of Chicago, 40 Ill. 147; Jenks *vs.* City of Chicago, 48 Ill. 296; Field *vs.* Park, 20 Johns, N. Y. 140. The case was cited but distinguished in Mahngren *vs.* Phinney 50 *50* Minn. 457, 463, wherein it was held that service of a summons by publication *in* Memorial day was valid, the court saying: "A large and respectable portion of the community who take the week-day issues, do not take the Sunday issue; hence a publication on Sunday would not be so likely to come to the attention of the parties for whom it is intended. It would not be so likely to serve the purpose for which it was designed, to wit: notice. Not so with papers issued on such holidays as Memorial day, the Fourth of July and the like, which are part of the regular issue, and are distributed among the same subscribers."

In Scammon *vs.* City of Chicago, 40 Ill. 146, it was held that in publishing a notice (in proceedings for special assessments required by law to be published six days) when one of the publications occurs on Sunday, the publication on that day cannot be counted. The court said:

"We think it clear that to permit officers to intrude upon families on Sundays for service of civil process, would be a violation of the spirit and policy of this law, and unbecoming a Christian community. The case of Johnston *vs.* The People 31 Ill. 469, was decided on the express ground that the taking of a recognizance might be a work of both necessity and charity, This in nowise conflicts with

the views we have here expressed. If the service of civil process would be invalid on Sunday, it necessarily follows that a publication of this notice on Sunday, if the law required but a single publication would be equally invalid, and the same rule must be applied to the present case, in which the Sunday publication must be counted to make out the requisite number. The notice stands in place of process, and it must be given on those days of the week which the law recognizes as appropriate to business of this character. To
282 permit it to be given on Sunday is against the spirit and policy of our law. A large and most respectable portion of the community consider it immoral to issue Sunday newspapers, and if these notices should be published in such papers, only, property-holders, entertaining these opinions, would have little chance of learning of the assessment." The foregoing case was followed in McChesney *vs.* People, 145, Ill. 614, 618.

In Sawyer *vs.* Cargile, 72 Ga. 290, it was held that publication of the advertisement of a marshal's sale for taxes in a newspaper appearing on Sunday, was not legal, and that a sale thereunder passed no title. The court said:

"Sunday is *dies non juridices* and service cannot be made or legal notice given on that day, or the business or work of ordinary callings done."

In Schwed *vs.* Hartwitz, 23 Colo. 187, notice of a tax sale, which was required by statute to be published for a prescribed period in a newspaper published in the county, was published only in the Sunday editions of a newspaper. It was held that no title was acquired by the purchase at the tax sale. The court said:

"The only decisions we have been able to find apparanetly to the contrary is in Hastings *vs.* Columbus, 42 Ohio St. 595, where it is held that the publication of certain ordinances with respect to street improvements, in a paper published only on Sunday is sufficient, but this decision is based upon a statute of Ohio, which provides that a summons may be served 'at any time.' The court says that under this provision, a service whether personal or by publication, upon Sunday, is valid. In this State, as a general rule, personal service cannot be made on Sunday, hence the entire reasoning upon the Ohio law is in favor of the conclusion reached by the district court."

In McLaughlin *vs.* Wheeler, 2 So. Dak. 379, it was held that publication of a summons in a Sunday paper is ineffectual. The head-notes are as follows:—

"At the expiration of thirty days, the summons in this
283 case not having been personally served, or its publication commenced, the statutory support ceased, and the attachment went down. Sec. 6247, Comp. Laws. pr-hibiting the 'service of legal process of any description whatever' on Sunday, applies to and covers a summons; for by section 4807, Comp. Laws, 'process' is made to include a writ of summons is issued in the course of judicial proceedings."

In Shaw *vs.* Williams, 87 Ind. 158, it was held that publication of notice of a sheriff's sale in a Sunday newspaper was a violation of

the Sunday law, and that a sale under the notice would be restrained by injunction.

The court quoted with approval from Smith *vs.* Wilcox, 24 N. Y. 353, and Scammon *vs.* City of Chicago, 40 Ill. 146, cited elsewhere in this brief.

In Smith *vs.* Willcox, 24 N. Y. 353 (affirming 19 Barb.) N. Y. 591; 25 Barb. (N. Y.) 341, it was held that a contract for the publication of an advertisement in a Sunday newspaper was void under the State Sunday law. The court said:

"The plaintiffs necessarily, in the performance of their agreement by the publication of the advertisement, violated the letter as well as the spirit of the act prohibiting the exposure of merchandise for sale on Sunday, and no action will lie upon such contract. In a sense it was a contract by the plaintiffs for the performance of servile work on the Sabbath. They agreed to publish and circulate the advertisement of the defendant on Sunday by delivering a copy to each of their customers who should buy of them a copy of their paper; and incidentally they agreed to expose for sale and sell on that day their paper containing the advertisement. This was servile work in the same sense that the service of the attorney's clerk was, or that of a salesman in a dry-goods store would be. The contract was void."

In Hastings *vs.* Columbus, 42 Ohio St. 385, (so much relied on by plaintiff) under a statute requiring that municipal ordinance "providing for improvements shall be published in some news-
284 paper of general circulation in the corporation," it was held that publication in a Sunday newspaper alone was sufficient. But in arriving at that conclusion the court examined the Sunday law legislation in Ohio, and held that "a summons or notice served by a sheriff, coroner or constable, on Sunday, is in Ohio lawfully served," whereas, it is the general rule that service of process cannot lawfully be made on Sunday.

19 Ency. Pl. & Pr., 600, note 3.

The second error assigned by plaintiff is to the effect that the court erred both in dismissing the plaintiff's suit and taxing it with costs and in not giving judgment against the defendant because plaintiff had the right and authority to pass the ordinance in question regulating rates, and because the rates being enforced by defendant, were in excess of the ordinance in question.

This brings us to the merits of the question.

We have shown that the city of Knoxville being fully authorized so to do, has entered into various contracts with the Knoxville Water Company, which are specially authorized by the charter of the latter with respect to rates and charges, both between the city and its inhabitants and defendant company, and that the *last contract* and agreement was made between the plaintiff and the defendant *within less than two years prior* to the passage of the ordinance in controversy, when before the city would grant to the defendant and the Lonsdale-Beaumont Water Company permission to consolidate certain material and valuable concessions were wrung from and

imposed upon defendant company in regard to filtered water, maximum schedule of rates, and specially, an extension of the city's right to purchase to all the property which the defendant then owned, or might thereafter acquire; and that all of these contracts entered into by the defendant have been faithfully lived up to, and observed by it, and were being faithfully executed by it on the day, and the date when the plaintiff attempted to arbitrarily pass an ordinance reducing rates below the maximum guaranteed to the defendant in its various contracts with the plaintiff.

285 It is true the difference between the rate charged by the defendant, and sought to be imposed upon it by the plaintiff, with respect to the water in question, is very small, but the principle is one of prime importance to the defendant, for if the plaintiff is entitled to thus arbitrarily reduce, under the guise of regulation, the rates to be charged by defendant to its consumers, its whole income is subject to confiscation by plaintiff, and in this way the value of defendant's property, which plaintiff's mayor, in his remarkable message to the city council (Trans. pp. 180 to 184) places at $800,000.00 will be so depreciated that plaintiff under its option to purchase, which grows out of and is guaranteed by the very contracts which defendant invokes for its protection, will be enabled to secure the property of defendant at a sum grossly below its real value, and thus the property of the defendant, and the interest of its stockholders,—though they do live in Boston, as stated by plaintiff's mayor—will be entirely dissipated and confiscated.

But we submit:

First. The ordinance of March 30th, 1901, impairs the obligations of the prior contracts made by the city with defendant company and is therefore void.

Constitution United States, sec. 10, art. 1.
Constitution State of Tenn. sec. 20, art. 1.
New Orleans Water Works Co. *vs.* Rivers, 115 U. S. 674.
New Orleans Gas Light Co. *vs.* Louisiana, 115 U. S. 650.
St. Tammany Water Works Co. *vs.* New Orleans Water Works Co. 120 U. S. 64.
Walla Walla *vs.* Walla Walla Water Co. 172 U. S. p. 1.
Los Angeles Water Co. *vs.* Los Angeles, 177 U. S. 570.
Santa Anna Water Co. *vs.* Town of, etc. 56 Fed. Rep. 339.

286 Bank of Ill. *vs.* City, etc. 76 Fed. Rep. 271.
Illinois Trust & Savings Co. *vs.* City of Arkansas City, 76 Fed. Rep. 271.
Old Colony Trust Co. *vs.* City of Atlanta, 83 Fed. Rep. 42.
Los Angeles City Water Co. *vs.* Los Angeles, 88 Fed. Rep. 720.
City of Cincinnati *vs.* Cameron, 33 Ohio, 336.
Cable Co. *vs.* Baltimore, 66 Fed. Rep. 140.
Los Angeles Water Co. *vs.* City of Los Angeles, 103 Fed. Rep. 711.
Crosby *vs.* City Council of Montgomery, 108 Ala. 498.
State *ex rel. vs.* LeClede Gas Light, 102 Mo. 472.

But it is insisted by plaintiff in error that it has the right to regulate the price of water supplied by defendant company without regard to its several contracts. And here it is proper to note, that from 1882 down to July, 1900, both plaintiff and the defendant continued to observe the obligations of the contracts entered into by them, and in the various corporate actions hereinbefore shown, plaintiff has always referred to its ordinance of July 1st, 1882, as a contract, as indeed it was, both in spirit, legal effect and form. And further it is proper to note that with respect to rates and charges, the *defendant has voluntarily reduced the same fully fifty per cent. lower* than the rate specified in the contract of July 1st, 1882. As early as April 1895, it had put into effect and published the rates and charges found in the record, (Tr. p. 145) which were in force on the 20th day of October, 1899, and which the city required defendant company to agree to maintain and keep in force as one of the conditions to the assent of plaintiff to the consolidation of defendant and the Lonsdale-Beaumont and Knoxville companies. That this schedule of rates and charges was just and reasonable must have been considered by the municipal authorities on the 20th day of October, 1899, and
287 indeed the presumption that such rates and charges were just and reasonable as strongly follows the mere passage of the ordinance of October 20th, 1899, as can arise from any subsequent act of the city. Can it be supposed that the defendant company would have undertaken the immense outlays of money, provided for in its several contracts with the city, and referred to by the mayor in his message to the council, giving his approval to the ordinance of July 27th, 1900, if defendant had supposed that its rates and charges were subject to the whims and caprices of subsequent municipal boards, which might, or might not, be actuated by the feelings evidenced in the mayor's message—principally that the stockholders of the defendant company were Philistines, living in Boston and that their property was fit subject for municipal spoilation?

The plaintiff was fully authorized to make the several contracts entered into by it with the defendant. The defendant, especially by its charter, and by the general law of the land, was authorized to enter into contracts with the corporate authorities of Knoxville, and with its inhabitants for the use of defendant's water, and charge such price for the same as might be agreed upon between said parties and defendant company. Now defendant contends that its right to regulate has not been and cannot be limited by contract. It is conceded by plaintiff that its power to regulate depends solely upon the construction of section 2 of chapter 104 of the Acts of 1877, under which defendant was chartered. That section has been set forth above. In the pamphlet acts of 1877, the marginal note opposite said section 2 is "leave of corporation," thus indicating that the essential and material part of said section was the "leave to operate" which it was necessary for the defendant to obtain from the city of Knoxville before its charter would be granted. And we insist that all that is meant by the last sentence of said section is that this leave to operate shall in no way interfere with or impair the police or general powers of the corporate authorities of such city. At that

point, in legal construction, there should be a period, and then follows the distinct subsequent declaration that such corporate
288 authorities shall have power by ordinance to regulate the price of water supplied by such company. Except for the declaration that such corporate authorities shall have power to regulate the price of water it cannot be contended that the city of Knoxville would have any such power. Without that part of said section, no such power was vested in the city, and it is an entirely new and distinct power, wholly separate from the police or general power which is inherent in every municipal government.

Now it is true that in the pamphlet acts as printed it reads thus: "And this act is in no way to interfere with, or impair the police or general powers," etc. But, we respectfully insist that by this is meant that the leave to operate heretofore provided, when granted, should in no way interfere with the general or police powers. And in this construction we respectfully insist that we are confirmed both by Milliken & Vert-ees in their compilation of the statutes of Tennessee, and by Mr. Shannon in his Code.

See Milliken & Vertrees, sec. 1696.

Shannon's Code, sec. 2498.

Both of these learned codifiers say: "*This* is in now way to interfere etc." meaning *this leave to operate*, covered by and which is the substance of that section shall not interfere with or impair the police or general powers. When we consider the situation of the parties, the surrounding circumstances, and the entire charter, we are compelled to the same conclusion. The grammatical construction of the sentence is then changed, but there is no change of meaning. The corporate authorities are introduced as a new grammatical subject for the reason that the power to regulate was a pre-existing power (Louisville Natural Gas Co. *vs.* Reynolds, 135 Ind. 49) like the general police power and had to be conferred by the positive declaratory language found in the concluding clause of the section, and it may be freely conceded to be reasonable that the city should have that power.

289 Then supplying the antecedent of "this" and filling the ellipsis at the beginning of the last part of the compound sentence, the provision reads as follows: "And such leave of the corporate authorities is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and *notwithstanding such leave*, such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by said company."

We submit therefore that it was never intended to say that the power to regulate was to be exercised, *notwithstanding a contract*, expressly or impliedly, renouncing that right. But it was a power granted to the city to regulate in the absence of a contract between it and defendant company, or between defendant company and the inhabitants of the city, which had been specially provided for in the first section of said act.

If the defendant company refused to enter into a fair and reason-

able contract with the city and its inhabitants, then and then only, might the city regulate the price of water supplied by defendant company. When we consider the situation of the parties, the surrounding circumstances, and the entire charter, we are compelled to this conclusion. The city was the "master of the situation," if it chose to refrain from making a contract, it might exercise the power of regulation, limited only by what would be unreasonable and oppressive. But if it should exercise the power vested in it, and specially conferred upon defendant company, and enter into contract with said company for the use of water, and agree upon prices for the use of such water, then it became bound by that provision of the Constitution of the United States which is written into every contract that it is sacred from alteration, change or impairment, except with the consent of the other party.

Indeed we may confidently urge that the contracts and agreements which the city entered into with defendant company were in every just sense an exercise of the power of regulation, and that having exercised that power, it is thereafter limited by its own
290 act in fixing rates and agreeing that defendant may charge up to those rates.

Such action upon the part of the corporate authorities in fixing and agreeing upon rates with defendant company, are recognitions of the reasonableness and justness of those rates.

Moreover, the water supplied, provided by these various contracts, was obtained only upon the faith of the water company, in the binding and irrevocable character of those agreements, and each and every provisions therein contained. If such were not the case, what city could persuade parties to invest their capital in improvements, which to be profitable, must either be permanent or continue for such a length of time as to enable the investor to receive some return upon the amount invested by him? A different construction would be disastrous to the interests of the city.

Walla Walla *vs.* Walla Walla Water Co. 172 U. S. 1, 20.

The fierce protest by water, gas and light companies revealed in numerous lawsuits, found in the reports of late years against unreasonable regulation of rates and breach of plighted faith demonstrate that no prudent corporation would be likely to expose itself to spoilation by the municipality.

But we confidently appeal to the decisions of the courts of last resort, both State and Federal, to sustain our construction of the charter of defendant, and its contract with plaintiff.

We will show:

1. It is competent for a municipal corporation effectually to renounce its right to regulate water rates.

In Los Angeles City Water Co. *vs.* City of Los Angeles, 88 Fed. Rep. 720, a suit was brought in the United States circuit court in California, to annul an ordinance of the council of the city of Los Angeles, fixing the water rates of the plaintiff water company for the period of one year, on the ground that said ordinance impaired the obligation of a certain contract between the city and the water com-

pany. The material facts of the case were these: In 1868 the city leased its water works to certain individuals for a period of thirty years, the lessees agreeing to pay an annual rental, cancel cer-
291 tain claims of theirs against the city, lay pipes, furnishing water free of charge to public buildings, etc., The contract of lease contained the following reservation and stipulation.

"Always provided that the mayor and common council of said city shall have, and do reserve the right to regulate the water rates charged by said parties of the second part, or their assigns; provided, *that they shall not so reduce such water rates or so fix the price thereof, to be less than those now charged by the parties of the second part for water.*" Later in the same year, and pursuant to their original intention the lessees organized the plaintiff corporation, and by written instrument duly recorded, assigned to the corporation their contract or lease with the city.

The act of the legislature incorporating Los Angeles in 1850, conferred upon the city the "power * * * to provide for supplying the city with water." The California constitution of 1879 makes the use of water for sale, etc., a public use, subject to the regulation of the State, and ordains that city and other municipal authorities *shall* fix water rates annually, and in 1889, a new Los Angeles charter, adopted by the legislature, imposed upon the city council the absolute duty to fix water rates annually. In 1897, the ordinance sought to be annulled in this suit was passed. It provided for the ensuing year rates for water to be charged by the plaintiff water company, which were lower than had ever been fixed before, and *lower than the rates in force when the contract of lease was executed the lease stipulating, as we have seen, that these rates should not be reduced by the city.*

Here then we have a contract by the city in effect the same as the contract in the case at bar with the Knoxville Water Company, but with subsequent express (State) constitutional and statutory authority broad enough in terms to sustain a future ordinance of the city violating that contract. Nevertheless, the ordinance was pronounced void, and the decree was affirmed by the United States
292 Supreme Court in Los Angeles, *vs.* Los Angeles Water Company, 177 U. S. 558, opinion written by Mr. Justice McKenna.

In the circuit court the various questions were thoroughly discussed on principle and authority in a long and able opinion by District Judge Welburn.

(1.) Construing the clause in the contract of lease which limited the right of the city to regulate water rates, the court held it to be in terms a limitation upon further and independent hostile legislation by the State or city. The court said:

"The contention of defendants is that said clause refers exclusively to a right of regulation given the city by the contract itself, and was not intended as a limitation upon any power which had been, or which might thereafter be, conferred by the legislature of the State. This contention is not well taken. The contract does not grant or purport to grant, to the city any right in respect to the regulation of rates; the language being that 'the mayor and com-

mon council of said city shall and do reserve the right to regulate water rates, etc.' The use of the word 'reserve' shows that the parties were contracting, not with reference to a right which it was supposed the lessees were granting to the city, but with reference to a right or power which they assumed the city already possessed. The parties manifestly intended by the clause now under consideration that the lessees should have a right to the maximum rates prescribes, namely, the rates that were then charged; and if the city was authorized to make such an agreement, neither it nor the legislature of the State could thereafter lawfully reduce the rates below the minimum so agreed upon."

In the supreme court, the city contended that "the contract only purports to bind the city in its corporate capacity—the city as landlord and owner, and not as a governmental agent of the State." This contention was overruled, the court saying (177 U. S. at p. 570.)

"It is not denied that the city had power to regulate
293 rates. Indeed, it is insisted that it was so constantly its duty that it could not be contracted away. It was not a power, therefore, necessary to be granted by the contract, and the distinction between the proprietary right and the municipal right made by appellants, would have been idle to observe. To have limited the right of regulation to the city in one capacity, and left it unrestrained in the other, would have been useless, and such intention cannot be attributed to the parties. We think, therefore, the power to regulate rates was an existent power, not granted by the contract, but reserved from it, with a single limitation—the limitation that it should be exercised to reduce rates below what was then charged. Undoubtedly there was a contractual element; it was not, however, in granting the power of regulation, but in the limitation upon it."

(2.) Did the city have authority to bind itself by the clause renouncing its right to reduce water rates?

Quoting 1 Dillon Munic. Corp. sec. 80 p. 115, wherein Judge Dillon classifies the powers of municipal corporation, and declares that they have "second, those necessarily or implied in or incident to the powers expressly granted" the court said "The power of the city of Los Angeles to agree upon water rates I think, is fairly implied in the power 'to provide for supplying the city with water' and therefore falls within the second class of powers enumerated by Judge Dillon."

The court cited Santa Anna Water Co. *vs.* Town of San Buenaventura, 56 Fed. Rep. 339, and Illinois Trust and Savings Bank *vs.* City of Arkansas City, (C. C. A.) 76 Fed. Rep. 271, as cases exactly in point and sustaining his conclusions and remarked that in the former case the facts were strikingly analagous to those in the case under discussion. Continuing, the court said (88 Fed. Rep. at p. 730):

"Defendants cite a large number of cases to the effect that a general power conferred upon a municipal corporation to supply the city with water does not include authority to grant an exclu-
294 sive franchise therefor to others. This proposition, however, is not now before the court, since the defendants admit that

the fact of an exclusive franchise having been granted to the complainants' assignors, if such was the case, does not vitiate the contract in any other respects. To my mind there is a clear and broad distinction, so far as concerns the power of a municipal corporation to make them, between the grant of an exclusive franchise to supply the city with water, and an agreement which abridges the right of such corporation to regulate the price of the water so supplied. The grant of an exclusive franchise is not an indispensible, or even appropriate, means to the procurement of water, and besides creates a monopoly (and it is upon these grounds that many of the decisions holding such grants inoperative are rested); while an agreement fixing the price to be paid for water does not destroy, nor is it inimical to competition, and is both appropriate and indispensible to a reasonable and convenient exercise of the general power to supply water. In procuring water or any other commodity, by purchase one of the first things to be considered and agreed upon is the matter of price. Therefore, to hold that general power without limitation in a municipal corporation, to supply the city with water, does not include power to agree upon price, it seems to me, would be a solecism."

And again at p. 731, the court said: "Grants of this power have been upheld in some well-considered cases, on the ground that the power is a business or proprietary power, as distinguished from a governmental or legislative power," citing Illinois Trust and Sav. Bank *vs.* City of Arkansas City, (C. C. A.) 76 Fed. Rep. 271; City of Cincinnati *vs.* Cameron, 33 Ohio St. 336, 367; Safety Insulated Wire and Cable Co. *vs.* City of Baltimore, (C. C. A.) 66 Fed. Rep. 140; State *vs.* Mayor etc. of City of Great Falls, 19 Mont. 518; 49 Pac. Rep. 15, 21; 1 Dillon Munc. Corp. sec. 29.

The same contract between the water company and the city of Los Angeles, came before the court in a subsequent case between
295 the same parties, where its validity and binding force upon the city were reaffirmed, and an ordinance in conflict with it was annulled.

Los Angeles Water Co. *vs.* City of Los Angeles, 103 Fed. Rep. 711, a case in the United States circuit court where Ross, C. J. writing the opinion, quoted with approval Meyer *vs.* Brown, 65 Cal., 589, wherein the court said: "It is occasionally well to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations, entered into for value, than there is to permit an individual to do so. Good faith and fair dealings should be exacted of the one equally with the other."

Illinois Trust & Savings Bank *vs.* City of Arkansas City (*supra*) cited in the Los Angeles Water Co. case (88 Fed. Rep. 720) was followed and approved in Cunningham *vs.* City of Cleveland, 98 Fed. Rep. 657, 663—in which case the defendant was a Tennessee city—to the point that a contract for water supply, etc. is contractual and not governmental or legislative.

In Crosby *vs.* City Council of Montgomery, 108 Ala. 498, the city made a contract with a water company prescribing maximum rates. Subsequently the legislature conferred upon the city express author-

ity to regulate the manner and rates of furnishing water and the city adopted an ordinance in that behalf which was claimed to constitute a repudiation of its contract. The court said:

"The city by ordinance could not prohibit the water company from charging rates as fixed by the contract as long as it remained in force and without modification * * * A city cannot by the pretended exercise of its police power, or the power to regulate water rates, prohibit the contracting parties from the exercise of every right and claim provided for in the contract, and which the parties had the right to provide for at the time, nor had the city authority by ordinance to change the terms of the contract without the consent of the other party."

It is therefore abundantly established by the foregoing authorities that the city of Knoxville had power to contract away its
296 right to regulate water rates, unless it can be shown that the legislature has expressly deprived it of that power.

(3.) The contracts of the city in this case exempt the water company from further regulation of rates.

In the next place, did the city, so far as it was competent for it to do so, contract with the water company that the latter should have the right to charge rates for water up to the maximum prescribed by the agreements of July 1882 and October 1899, free from future regulation by the city? There would seem to be no doubt that such was the purport of those contracts.

They were made pursuant to an express power "to contract" conferred in the charter of the water company. The consideration as hereinbefore show- was ample.

The contract contained no provision and no allusion to a right of the city to change the rates therein fixed. Applying ordinary rules, the written contract must be conclusively presumed to embody the entire agreement of the parties.

It was in form a *contract*, was so designated emphatically in the contract ordinance, and was formally accepted by the water company.

In Los Angeles City Water Co. *vs.* City of Los Angeles, 103 Fed. Rep. 711, 734, the city maintained that the contract with the water company, mentioned in another part of this brief was binding upon the water company, "yet" as the court said "the astonishing claim is now and here made on the part of the city," that the city had ceased to be under reciprocal obligation. The court said "It ought not to be necessary to cite decisions to show that this contention is wholly without merit. It is a self-evident proposition that it takes at least two parties to make a contract, and it is equally plain that as long as it exists at all, all parties are bound by its provisions.

The stipulation in respect to maximum rates was a contract that the water company should have the right to charge rates up to that maximum.

The stipulation in respect of maximum rates was a con-
297 tract that the water company should have the right to charge rates, up to that maximum.

In State *ex rel. vs.* La Clede Gas Light Co., 102 Mo. 472, 482, where

the relator, a city, contended that its contract prescribing maximum rates did not operate as an *agreement* for rates within the maximum, the court said that "if the contention of relator is to prevail, then it would have been but an idle ceremony to have inserted in the ordinance *any maximum price* at all, since, according to that contention, the city had *carte blanche* to insert at her pleasure any figure *beneath* the *maximum* and to compel the respondent to accept it. But this would have been tantamount to making a contract, where *one party dictates the price*, something which certainly seems at variance with all our preconceived ideas as to the fundamentals of a contract. With equal propriety, a payee in a promissory note, payable on or before a period of six months after its date, might contend that this was only the maximum of time in which the payor had to pay, and that there was nothing in the note 'prohibiting' payment *before* the ultimate date, that therefore it would be in the 'discretion' of the payee to demand payment at an earlier period. We are not of the opinion that the ordinance will bear any such unwarrantable construction as relator desires us to place upon it. This is a case where 'affirmative specification excludes implication.' Maguire *vs.* State Savings Association, 62 Mo. 346, and cases cited; Broom Leg. Max. (8 ed.) 652. 667."

In Logansport etc. Gas Co. *vs.* City of Peru, 89 Fed. Rep. 185, an ordinance contract like the one in the case at bar fixing maximum rates, was treated as a *contract* in the discussion thereof by the court, that prices up to the maximum might be charged during the period of the contract. And the court said (89 Fed. Rep. 186) "This provision of the ordinance, when accepted would for its validity, rest on the contracting, and not on the legislative power of the city council."

In Capital City Gas Co. *vs.* City of Des Moines, 72 Fed. Rep. 298 818, the court overruled a demurrer to a bill to enjoin the enforcement of a municipal ordinance reducing gas rates, the bill alleging that the ordinance was unreasonable. Under authority to "regulate the price of gas" the city council passed the ordinance complained of, which fixed the maximum rates the plaintiff company might charge for its gas.

"Previous to the passage of this ordinance," said the court, (72 Fed. Rep. 821) "a contract had been in force between plaintiff and defendant, fixing the maximum rates plaintiff might charge for its gas. But the period of this contract provided for such rates had expired when the ordinance now in question was passed." The court then proceeded to discuss the question of reasonableness; but it is evident from the remark of the court that the pre-existing contract was considered as binding so long as it remained in force. See also the same case on the hearing of an applicant for preliminary injunction, 72 Fed. Rep. 829, 833, 834.

The case of Freeport Water Co. *vs.* Freeport, 180 United States 587 (followed in Rogers Park Water Co. *vs.* Fergus and Danville Water Company *vs.* Danville City, both reported in 180 U. S.) so much relied upon by plaintiff, is not opposed to the decisions hereinbefore cited, on the contrary the principle contended for by the defendant water company is expressly recognized in said cases.

Justice McKenna said in the Freeport case.

"It is not clear from the opinion of the court (the supreme court of Illinois) whether it intended to decide that municipal corporation cannot be invested with the power to bind themselves upon an irrevocable contract not to regulate water rates. If so, we cannot concur in that view. We have decided to the contrary many times, and very lately in Los Angeles *vs.* Los Angeles City Water Company, 1900, 358 U. S. See, also Walla Walla *vs.* Walla Walla Water Company, 172 U. S. 1, 7, where the subject is more extensively discussed and the cases reviewed. See also New Orleans Water Works Co. *vs.* Rivers, 115 U. S. 674."

In the Freeport case an Illinois statute gave the city council
299 authority to "empower a private corporation to construct and maintain water works at such rates as may be fixed by the ordinance" for a period of not exceeding thirty years.

The supreme court of Illinois held that "the meaning of this language is not that the water works are to be maintained at such established rate as may be fixed by one ordinance for a period not exceeding thirty years," and that the city could by ordinance reduce the rates fixed by a prior ordinance.

On writ of error the United States Supreme Court, by the bare majority of five to four (Justices White, Brewer, Brown and Peckham vigorously dissenting) held that the statute was ambiguous, and that pursuant to the general rule of decisions on writ of error to the State courts, that "for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of view with the State courts, if the question seems to them balanced with doubt," the construction by the State court should be adopted by the Federal courts.

It must be observed and unquestionably it had great weight with the Supreme Court of the United States, that the rates sought to be enforced by the water company in the Freeport cases were unjust and unreasonable, and so admitted by the water company in its pleadings, and this court will observe from an inspection of the opinion in that case that the rates sought to be enforced by the Freeport Water Company were double the rates provided in the contract between the city of Knoxville and the defendant company.

In the Griffin *vs.* Goldsboro Water Company, 41 L. R. A. 240 cited by plaintiff in error, the supreme court of North Carolina went no further than to say that a schedule of maximum rates in a contract by a city with a water company, does not bind customers in the payment of such maximum rates, if they are unreasonable, And we do not desire to question this doctrine, but such is not the case at this bar.

The ordinance of March 30, 1901, is void because it is unreasonable, oppressive and deprives the defendant of its property and liberty without due process of law.

300 By the contract of July 1st, 1882, plaintiff acquired an option upon the plant and property of the defendant company. At this time, the city of Knoxville comprised only the first nine wards of the city as it now exists. Contiguous to these nine

wards, there was afterwards incorporated a municipality known as the town of North Knoxville, which in 1891, entered into a valuable thirty-year contract with Wheeler & Parks, providing for a supply of water, and providing a maximum schedule of rates and charged, which said Wheeler & Parks were authorized to charge for water supplied by them. This contract of Wheeler & Parks was afterwards assigned to defendant company.

Another municipality known as the town of West Knoxville sprang up on the west side of the city and contiguous to and this town entered into a twenty-year contract with the Lonsdale Beaumont Water Company, and in said contract it was specially provided that the Lonsdale-Beaumont Water Company might charge according to a maximum schedule set forth in said contract. The defendant company acquired both the North Knoxville and the West Knoxville contracts, and the property covered thereby. By the ordinance contract of October 20th, 1899, the option to purchase reserved to the city in the contract of July 1st, 1882 was made to extend to and over all the property which the Knoxville Water Company then owned, or might thereafter acquire, and defendant was given the right to and bound itself to maintain the rates and charges then in force.

The income of defendant company is dependent upon the revenues collected by it from its patrons, and the reasonable and just charges which it may enforce against them. If plaintiff is permitted to arbitrarily reduce these rates and charges that is to reduce the rates and charges provided for in the contract of October 20th, 1899, which are presumed to be reasonable and just, it can arbitrarily reduce and impair the value of defendant's property, which it may be anxious to buy upon an appraisal under the contract of July 1st, 1882, and it can also arbitrarily and by said ordinance of March 30th, 1901, does arbitrarily undertake to reduce the
301 the amounts which plaintiff agreed to pay defendant company for its water, and it is shown in the proof and the special findings of the trial judge, that the plaintiff does take water outside of the free uses and hydrant rentals, and has been paying therefor according to the schedule in force on October 20th, 1899.

Further, defendant has, with its customers more than 4000 written contracts, under and by which it agrees to furnish, and its customers agree to take water at the prices agreed upon between them—that is the just and reasonable schedule provided by the ordinance—contract of October 20th, 1899.

The result of the enforcement of the ordinance of March 30th, 1901, is to arbitrarily reduce the revenues and confiscate the property of defendant, and thus enable plaintiff to purchase same at an appraisal below its worth, and all this without a hearing or a method provided for reviewing the arbitrary fixing of rates and charges by plaintiff.

The legislature cannot constitutionally delegate the power to fix prices at which water shall be sold in a city to the authorities of the city, which is itself a customer, either in its municipal capacity or

through its inhabitants without some provision for a judicial investigation of the reasonableness of the rates fixed by such authorities.

Agua Pura *vs.* Las Vegas, L. R. A. 220.

In Cleveland Gas Light and Coke Co. against The City of Cleveland, Justice Jackson, said:

"It would be a fearful proposition—monstrously absurd and outrageous, if the legislature which undertook to confer upon a citizen of Cleveland the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished, the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The city of Cleveland has undertaken to do that thing * * * The thing cannot be done, and ought not to be done."

71 Fed. Rep. 614.

302 In Agua Pura *vs.* Las Vegas (*supra*) the court quoted approvingly the language of Justice Jackson, and held that the action of the city authorities in attempting to fix and enforce each violation by a penal ordinance, without making any provision for a judicial investigation of the reasonableness of the rates was invalid and void, and in contravention of the 14th amendment to the Constitution of the United States.

By that amendment as well as the constitution of Tennessee, the defendant cannot be deprived of its property or liberty without due process of law.

Not only are the revenues which the defendant has a right to collect under the reasonable charges provided in its contracts with the plaintiff property, but the right to contract with the inhabitants of the city of Knoxville and which has been exercised as hereinbefore shown, is property and liberty within the meaning of our constitution and the 14th amendment to the Constitution of the United States.

See Treatise of 14th Amendment to the Constitution of the United States by Judge Henry Brannan of the supreme court of West Virginia, pages 94, 110, 113, *et seq.*

In Bank *vs.* Devine Grocery Co., 13th Pickle, 604, this court through its chief justice, upheld and sustained the right to contract as one to be enjoyed to the fullest extent and perfection, and one of the objects of the Constitution was to preserve and protect this right.

Stratton Claimants *vs.* Morris Claimants, 5th Pick. 497.

"*By due process of law*," which is synonymous "*with the law of the land*" is intended that general law "which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial." By it is meant the natural and inherent principles of justice and it forbids that one man's property, or right to property, shall be taken for the benefit of another, or for the State without compensa-

tion, and that no one shall be condemned in his person and property without *in proper form being heard* in his own defense.

Holden *vs.* Hardy, 169 U. S. 390, 391.

303 Davidson *vs.* New Orleans, 96 U. S. 97.

L. & N. R. Co. *vs.* Schmidt, 177 U. S. 230.

Brannon on 14th Amendment, 140 *et seq.*

Regulation without investigation is without due process of law.

Gas Light Co. *vs.* Des Moines, 72 Fed. Rep. 838.

If the court shall be of opinion that the view and opinion of the learned circuit judge in regard to the invalidity of the ordinance in question, because it was passed at a void special meeting was erroneous, and also be of opinion that the publication of said ordinance on Sunday was not illegal, then we respectfully insist that the judgment of the learned court is correct, because:

First. The water which it is alleged in the warrant of the recorder was sold by defendant company to W. K. McClure was not sold to him, but in fact was sold through him to J. S. Gratz, who paid the charges sought to be enforced by defendant company therefor. The ordinance in question is highly penal and it must be strictly construed.

Second. The judgment in favor of defendant company should be affirmed, because the ordinance in question violates sec. 10, art. 1 of the Constitution of the United States, in that it impairs the obligations of the contracts existing between defendant company and plaintiff.

Third. Because the ordinance in question is unjust, unreasonable, oppressive and deprives defendant of its property and liberty without due process of law.

Therefore for these reasons, we submit the judgment of the lower court should not be reversed, although this court may be of opinion that the trial judge assigned erroneous reasons for its rendition.

Railroad *vs.* Mahoney, 85 Tenn. 318.

Hughes *vs.* Marquet, 85 Tenn. 127.

Chambers *vs.* Chambers, 92 Tenn. 710.

Therefore confident in the protection of the constitution of our State, and secure in the guarantees of the Constitution of

304 these United States, exercising only our charter and contract rights, and only desiring to continue the reasonable and just rates provided in the contract of October 20th, 1899, we appeal to this court for an affirmation of the judgment of the lower court upon the merits of the controversy.

CHARLES T. CATES, JR.

305 Filed Nov. 2, 1901.

MAYOR & ALDERMEN OF THE CITY of Knoxville
vs.
KNOXVILLE WATER CO. ET ALS.
} Law Docket, Knox County.

Opinion.

This suit arises out of an effort upon the part of the city of Knoxville to enforce an ordinance which affects the defendant water Co., and as it claims seriously interferes with its operation and unlawfully encroaches upon its franchises and vested rights.

The water company has a valuable plant at Knoxville, which it has erected and operated under contracts and ordinances made by the city of Knoxville, and it has valuable franchises in the furnishing of water to the city and people.

The relative rights of the city and water Co. and their obligations one to the other appear to have been drawn into sharp controversy when the city on the 30th of March, 1901, passed and approved the ordinance in controversy in this suit, specifying a maximum rate to be charged to consumers by any firm or corporation in the city of Knoxville, and providing a high penalty for a violation of its terms and provisions as set forth in its 3rd section, to wit:

"SECTION 3. Be it further ordained, That it shall be unlawful for any person, company, firm or corporation or their officers, agents, servants or employees, supplying water to the inhabitants of the city of Knoxville to charge, demand or collect for water so supplied, more than the rates hereinbefore set forth in section "I" of this ordinance; and it shall also be unlawful for any such person, company, firm or corporation or their officers, agents, servants, or employees to cut off or otherwise interfere with the supply or refuse to furnish a supply of water to any consumer for failure to pay for same, provided such consumer tenders in lawful money, the charge for such water
306 at the rates aforesaid, and any violation of the provisions of this section of this ordinance, shall be a misdemeanor, and upon a conviction thereof before the recorder, the offender shall be punished by a fine of not less than $10.00 nor more than $50.00 for each offense."

The defendant company continued to charge the rates provided in a contract and previous ordinance of October 20th, 1899, which (with the exception of some rates in the Lonsdale-Beaumont ordinance) were slightly in excess of the rates and charges provided in said ordinance of March 30, 1901; and thereupon this suit was instituted, and the defendant was charged with unlawfully, charging, demanding and collecting of W. K. McClure for water furnished and to be furnished him in the city of Knoxville, more than the rates fixed therefor by the ordinance of March 30, 1901.

McClure was the agent for J. S. Gratz, who then lived in the city of Chicago, but was the owner of three houses and lots in the city of Knoxville, and outside of the 10th ward. In 1896 the defendant

company made a contract with Gratz to supply water to the premises owned by him, which contract is as follows:—

"Knoxville Water Company, service No. 2850.

KNOXVILLE, TENNESSEE, *Sept.* 17, 1896.

The undersigned hereby applies to the Knoxville Water Company for a supply of water at premises No. 706 High street, owned by J. S. Gratz, occupied by tenants, to be used for domestic purposes only, and I hereby agree to use and pay for the same in accordance with the rates, rules and regulations of the Knoxville Water Company as now, or hereafter in force, and which are made a part of this contract.

And I further agree that said company may enter upon any land owned by me, and in which I may have such right, and place therein, upon the terms provided therefor all the pipes that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require."

This contract was signed by J. S. Gratz by his agent, W. K. McClure.

The water in controversy was furnished to tenants living in the property owned by Gratz for whom McClure was agent, and who, as such agent, represented the owner Gratz in renting the property, and the bills were rendered to W. K. McClure as agent, and
307 paid by him in that capacity, but actually paid out of funds belonging to the owner J. S. Gratz; and the bills so rendered for said water were in accordance with the rates prescribed by said contract and ordinance of October 20, 1899; the difference between the rates charged by defendant and paid by Gratz, through McClure, for the three premises to which the water in controversy was furnished, and what would have been paid under the ordinance of March 30th, 1901, was $1.15, that is 50 cents, 42 cents, and 23 cents, respectively.

The first question presented is as to the validity of the ordinance of March 30th, 1901, because of the manner of its passage by the city council.

The charter of the city of Knoxville, provides that no ordinance shall become a law without first having been read and passed at three several meetings, that is, at three several regular meetings of the board, or at three several regular meetings or valid "call" or "special" meetings, which the mayor, by said charter, is authorized to call. The regular meetings of the board of mayor and aldermen of the city of Knoxville, are on the first and third Friday nights of each month. The ordinance of March 30th, 1901, was passed on its first reading at a special meeting on March 9th, 1901; on its second reading, at a regular meeting on March 15th, 1901; and on its third and final reading at a special meeting on March 30th, 1901. The mayor and eleven aldermen, that is one aldermen for each ward, constitute the board of mayor and aldermen of the city of Knoxville. At the special meeting of March 30th, 1901, Alderman Cleage, representing the 6th ward, and Alderman Trigg, represent-

ing the 5th ward, were not present and were not notified, and no effort was made to notify them, nor did they have any notice or knowledge of said meeting. Alderman Trigg had removed from the city, and notice to him it is conceded was not necessary. Alderman Cleage was not present at the meeting of March 30th, 1901, was not notified of that meeting and had no knowledge thereof. When Alderman Cleage was elected an alderman for the
6th ward of the city of Knoxville, he was then as he was
308 in March, 1901, residing with his mother on Broad street in the
6th ward of the city of Knoxville, but he was in the employ of the Southern railway, with headquarters principally at Asheville. He was active in the discharge of his duties as an alderman, attended nearly all of the regular meetings and such special meeting as he had notice of, and was usually informed by telegram of special meetings, and had attended as many as three special meetings in one week, coming more than a hundred miles to do so. No effort was made to notify Alderman Cleage of either of these special meetings.

On request for a finding of facts, the trial judge found that it was practicable to have given Alderman Cleage notice of these special meetings and that it was practicable for him to have attended the meeting of March 9th, 1901, and that no emergency existed for the passage of the ordinance in question at these special meetings.

The first assignment of error we consider is that the trial judge erred in holding that the mayor was bound to give Alderman Cleage notice of the special meetings of March 9th and March 30th, 1901, these being the dates when the ordinance in question was passed on its first and third readings, and for failure to give such notice the ordinance is void. The contention is that said Cleage was out of the city and State and not within summoning distance, and no personal notice to him of said meetings was practicable, and therefore the action of the council, without notice to him, was not thereby invalidated. In support of this assignment authorities are cited. The fact that Alderman Cleage was not notified, of the meeting, and that no attempt was made to notify him, fully appears and is not controverted.

The general rule is that every member of a municipal council is entitled to reasonable notice of special meetings, and that no important action can be lawfully done by such meeting unless such notice has been given, or unless the members, not notified, actually attend and participate in the business of the meeting. Land Co. *vs.*
Jellico, 19 Pickle, 321.

309 It is said that the rule is quite rigidly stated in that case but that conceding it to lay down the general doctrine, still there are exceptions to such general rule and that one of these exceptions excuses notice when it is not practicable to give it, and for this proposition is cited in the printed brief:

1 Dillon on Mun. Corp. sec. 286.
1 Beach on Publ. Corp. sec. 271.
15 Encl. Law. (1st ed.) pp. 1034–1035.

Other authorities are cited as applicable to cases of private corporations and inferior municipal and school boards which we think we need not consider. As bearing upon the main question it is suggested that it has never been the custom in Knoxville to give notice to each and every one of the board of special meetings; that Cleage had virtually removed himself from the State so that service upon him was impracticable; that in the case of Land Co. *vs.* Jellico, 19 Pick. 320, it appeared that the alderman who was not notified was in the building where the meeting was held, and the inference might be that he was purposely omitted from the notice as he was hostile to the ordinance that was considered, and the meeting was at the instance of the person interested in the passage of the ordinance, while in this instance, as afterwards developed, Alderman Cleage was in favor of the ordinance, and would have voted for it, if he had been present at the meeting.

We pass over these and minor exceptions and proceed to consider the merits of the 1st assignment.

In 1st Dillon, Municipal Corporations, 4th ed. sec. 296, it is said: "If the meeting of the council be a special one, the general rule is, unless modified by the charter or statute, that notice is necessary and must be personally served if practicable upon every member entitled to be present so that each one may be afforded an opportunity to participate and vote."

In section 263 it is said: "A notice when necessary, must, if practicable, be given to every member who has a right to vote when the act is one to be done by a body consisting of a definite class or
310 classes and it must be given by or issued by some one who has the authority to convene a corporate meeting.

But notice may be altogether dispensed with or its necessity waived by the presence and consent of every one of those entitled to it. It must be served personally upon every resident member or left at his house. If temporarily absent it may be left with his family or at his house or last place of abode. An order to serve all is not sufficient. All if practicable, must be served, but if the party entitled to notice has entirely quit the municipality and has no family or home within its limits notice is not necessary."

In section 264, it is said, among other things: "Such great importance is attached to notice, that it can only be waived by universal consent, but if every member of a select body be present at a regular or stated meeting, or at a special meeting, they may *if every one consents, but not otherwise*, transact any business, ordinary or extraordinary, though no notice was given, or an insufficient notice, but the *unanimity of consent should clearly appear from their recorded declarations, acts or conduct.* * * * If the charter imperatively requires a special notice it cannot be waived even by the consent of all."

In 1st Beach on Public Corporations, sec. 265, it is said—

"When a meeting is assembled for a special purpose every member who has a right to vote is entitled to notice unless he has quit the municipality without retaining a home or leaving his family within its limits.

* * * * * * *

It must be personally served upon him, but in case of his temporary absence, it may be left with his family or at his last place of abode."

Again sec. 271—

"Every member entitled to be present at a special meeting is entitled to notice of the time and place thereof, which must be served upon him personally if practicable, or unless some other mode of notice is prescribed by the statute or charter." For
311 all these propositions authorities are liberally cited."

In 15th Am. & Eng. Ency. Law, page 1035, it is said * * * "A meeting held at any other time than that fixed for a regular meeting under a resolution of the council or a special meeting under the call of the mayor is a legal meeting if all its members actually attend and participate in its proceedings and it is otherwise regular."

In Lord *vs.* Anoka, 36 Minn. 176, it was held that under the charter of the defendant a special meeting of the city council is not valid unless called by the mayor by written notice to each member of the council delivered to him personally or left at his usual place of abode, or unless all the members, at least all who are not notified, are present at the meeting." And in Beaver Creek *vs.* Hastings, 52 Mich. 528, it is said notice may be dispensed with or waived by the presence of every one entitled to it.

In Paola Railroad *vs.* Commissioners, 16 Kas. 302, holding that the acts of a board of county commissioners at a special meeting were invalid because all members were not notified, Mr. Justice Brewer said:

"The statute providing for the sessions of the county board is found in section '13' page '256' of the General Statutes. That section after providing for the meeting of the board in regular session, adds: 'And any special session on the call of the chairman at the request of two members of the board, and as often as the interest of the county may demand.' This is the only statutory provision on the subject. It does not specify whether the call shall be verbal or in writing, how long prior to the meeting it shall be made, or require a record to be preserved of it. And the same is true as to the request. But still it requires a 'call' and the call of the meeting, in the legal sense of the term, is a summons to the parties to meet, directing them to meet. It involves something more than a mere purpose in the mind of the caller or an expression of that
312 purpose unheard, unseen and unknown. It implies a communication of that purpose to the parties to be affected by it. How it shall be communicated is sometimes prescribed by the statute or by law. It is sometimes provided that it shall be by publication in a newspaper; sometimes by printed notice served personally, or at the residence, and sometimes by mere oral personal service. But in some way or other notice must be given; and if there be no regulation as to the manner of notice, it must be personal notice. This is no new question. It has arisen in respect to the sessions of common councils, of cities, boards of directors or trustees of private corporations; the town meetings of New England, the meetings of most

of corporations, boards of directors etc. And there is but one uniform rule running through the authorities. In the case of Rex *vs.* Mayor etc. of Shrewsberry, Rep. Temp. Hard. 151, it was said by the court, that 'when the acts are to be done by a selected board, notice must be given of the time of special meetings.' It was a saying of Lord Kenyon's that special notice must be given to every member who has a right to vote."

In regard to county boards, it is said—A special session of the board has no power to transact business unless it has been called in the manner provided by law, and notice of the meeting is in all cases essential.

7 Am. & Eng. Ency. Law. 2nd ed. 979 N. 2., citing among other cases, Pike Co. *vs.* Rowland, 94 Pa. St. 238, which holds that if the meeting be special, notice is necessary and it must be personally served if practicable upon every member entitled to be present.

In People *vs.* Batchelder, 22 N. Y. 129, it was held that the election of the clerk of the 1st district court was void because five absent aldermen had no notice of the convention.

Mr. Justice Selden, for the court, said:

"It is not only a plain dictate of reason, but a general rule of law that no power or function entrusted to a body consisting
313 of a number of persons, can be legally exercised without notice to all the members composing such body."

The case of The State *vs.* Wm. Kirk, 46 Conn. 397, is somewhat obscurely reported, but as we read it, it appears that Wm. Kirk was elected street commissioner of the city of Bridgeport on the 8th of April, 1878. It appears that he had been previously elected to the same office, but the exact date does not appear. He insisted that he was legally elected on the 8th of April, but if that contention was not correct he was rightfully in office as a hold-over from his former election. It appears that at the first election, one member of the board was not notified. The court held that a good reason was shown why actual notice was not given. The member absent was not only gone from the State, but his whereabouts appears not to have been known until afterwards. Notice in writing was left at the store of his son, where he was in the habit of visiting every day when in town. The court said no other notice could well have been given and the law never required impossibilities.

But in the same case it appeared that by the charter the mayor was *ex officio* a member of the board, and its chairman, and entitled to preside. He was not notified of the meeting, and it was held that the meeting was illegal although he had no vote except in case of a tie. And it appeared that in the particular instance he would have had no vote. The report of the case as furnished us is not satisfactory but it clearly appears that the mayor might have been notified and was not and the meeting was adjudged illegal. While in the other case the member could not be found and hence was not notified, though all was done that could have been done, and it was impossible to do more.

The finding of the trial judge which was asked for by the plain-

tiff, as to Alderman Cleage contains among other statements not important in this connection, the following:

"At the time of his election as an alderman of the city of Knoxville and on March 9, 1901, and March 30, 1901, he was in the employ of the Southern Railway Co. as law agent with his
314 headquarters at Asheville in the State of North Carolina, and transacted his business principally in the State of North and South Carolina and outside the limit of the State, his territory including about 500 miles of railroad. His duties require him to go in person over his territory investigating, reporting and adjusting claims for damages against said R. R. Co.; that during the months of February, March and April, he was more than usually busy in the discharge of his duties, but retained his home in the 6th ward of the city of Knoxville, and was active in the discharge of his duties as an alderman; that he attended nearly all the regular meetings of the council, and nearly all the special meetings of which he had notice; that it was impracticable for him to have been present on March 30th, 1901, at the special meeting on that date, but it was not impracticable to have given him notice of that meeting; that it was not impracticable to have given him notice of the meeting of March 9th, 1901, but it does not appear that it was impracticable for him to have attended that meeting; that there was no emergency for this ordinance to be considered at special meetings of March 9th and March 30, 1901, and as a public servant and official he had a right to have notice of these meetings but notice was not given him, and therefore this ordinance of March 30th is invalid."

There are various exceptions to the finding of the trial judge but we think we need notice only one or two of them.

In the 10th subdivision of the 3rd assignment of errors, it is said: "He (the trial judge) erroneously found that it was practicable to have given Cleage notice of the special meetings of March 9th and March 30th, 1901, and that it does not appear to have been impracticable for him to have attended the meeting of March 9th. There was no evidence to support this finding. It was contrary to all the evidence on the subject. Cleage was beyond the limit of the city and State, his exact whereabouts were unknown to the officials of the city and the facts and circumstances as shown by Cleage as well as his direct testimony to the fact all show to the contrary of
315 the court's finding on this question."

This assignment, that there is no evidence to support the finding of the trial judge, requires us to go behind that finding and look into the record and see whether there is any evidence on which to base it.

In this connection it may be remarked that the question whether notice was or was not practicable is one of mixed fact and law. It appears from the testimony in the record, that each call for a special meeting on the 9th and 30th of March, 1901, was for a meeting to be held on the night of the same day the call was made, that is, on the night of March 9th and March 30th respectively. It clearly appears from the evidence of Alderman Cleage that on both of these days he was beyond the limits of the State. He cannot identify particularly

the exact place where he was on the 9th but he was at some point on his territory, all of which was outside the limits of the State. He is very positive and definite that on the 30th of March, 1901, he was in North Carolina at the extreme end of his territory, about three hundred miles from Knoxville.

We are of opinion that when a member of the council removes from the State or is continuously absent from the State, and when he is shown to have been absent from the State and beyond reach on the occasion and at the time of the call, as appears in this case, it is not *legally practicable* to give him notice of called meetings. As to the necessity and urgency of such called meeting, the mayor must be the judge. In this case it appears that action was desired at the time in order to put the new ordinance in force before the beginning of another quarter, when current bills for water would be payable in advance. As to the sufficiency of this urgency it is not incumbent on us to determine. The charter provision is that the mayor may call special meetings whenever, in his judgment, the good of the city requires it.

316 Tested by these rules which make the question as to whether or not notice was practicable, one of mixed law and fact, we think the evidence is that notice of these special or call meetings was not legally practicable to have been given to Alderman Cleage. Moreover it appears that if he had been notified of the call of March 30th, as soon as possible after it was made, it would not have been practicable for him to have attended the meeting of that day as he was about 300 miles from the city of Knoxville—This, however, we consider of no practical importance.

The ordinance not being invalid because of the manner of its passage, we proceed to consider the other question presented in the record.

317 It is further objected to this ordinance that it is invalid and inadmissible in evidence because it was published in a Sunday newspaper.

It appears, that the ordinance, by authority of the city, was published in the Sunday issue of the Journal and Tribune, a morning daily paper of the city of Knoxville, on March 31, 1901. It further appears that since 1866, Sunday editions of the daily paper have been published in this city and that there editions are the largest and most important, have the largest circulation, and are the best advertising mediums of any of the daily issues of the papers.

By the charter of the city of Knoxville, Acts, 1885, special session, chapter 8, section 28, it is provided "This act is declared to be a public act and may be read in evidence in all courts of law and equity, and all ordinances, resolutions, and proceedings of the board of mayor and aldermen may be proved by the seal of the corporation, attested by the recorder, and when printed and published by the authority of this corporation, the same shall be received in evidence in all courts and places, without further proof, when certified to by the recorder."

This is the only requirement as to the publication of ordinances. We have been cited to quite a diversity and collection of authori-

ties bearing more or less upon this feature of the case. It has been held in Tennessee that the acknowledgement of a deed by a married woman with her privy examination is valid, though made on Sunday.

Lucas *vs.* Larkin, 1 Pickle 355.

It is said, contracts in Tennessee made on Sunday have never been held by our supreme court, to be void. It is held by the Federal courts, construing Tennessee statutes, that they are valid.

Swann *vs.* Swann, 23 Fed. Rep. 299 citing,
Amis *vs.* Kyle, 2 Yer. 31.
Also Notes to Shannon's Code, sec. 3029.

As applied to newspaper publications, which may be regarded as process, they are held void, just as any other judicial proceed-
318 ings on Sunday are invalid, under the rule, both at common law and by statute above stated, that Sunday is "*dies non juridicus.*"

17 Ency. Pl. & Pr. p. 102.

The leading case cited in support of this text is
Schwed *vs.* Hartwitz, 22 Colo. 187.
Same case 58 Am. St. Rep. 221.

This holds that the publication of a notice of a tax sale is in the nature of service of process, and if it takes place in a Sunday edition of a newspaper, it is void. The same holding upon the same ground is made in the case of Sawyer *vs.* Cargille, 72 Ga. 290, which is another tax-sale case. See note to 24 Encl. Law, 577.

But no other notice or publication made on Sunday, unless specially prohibited by statute, is void.

"In Hastings *vs.* Columbus, 42 Ohio St. Rep. 585, it is held that the publication of a preliminary and other ordinances of street improvement, which were required to be made in a newspaper of general circulation, may be made in a paper published only on Sunday." This case is directly in point.

"Where there is a stipulation between private parties that notice shall be given by publication of ten days, publications on Sunday may be counted."

Kingsbury *vs.* Buckner, 71 Ill. 514. Cited in note 1 to 24 Encl. Law, 1st ed. p. 577.

"In South Carolina, it is held that notice of escheat is not a process, such as is meant that Sunday is *dies non*, nor when published in a newspaper on that day, is it served on that day. The statute forbidding the service of civil process on Sunday does not make such process void."

Eason *vs.* Wilfcoskey, 29 S. C. 239. Cited in note to 24 Encl. Law, 1st ed. p. 575.

"Notice to a consignee, given on Sunday, of the arrival of a cargo, is valid."

Lake *vs.* Hurd, 38 Conn. 540.

"And notice to quit is not invalid because given on Sunday."
319 Sangster *vs.* Noy, 16 L. T. (N. S.) 157.
24 Encl. Law, (1st ed.) 579.

"So too, an enlistment made on Sunday is valid."
Walton *vs.* Garvin, 16 Q. B. 48.

The statute laws of the different States are so variant, than we can derive but little aid from their holdings. It is further said the validity or invalidity of an act done upon Sunday does not rest upon religious or moral grounds, or upon public policy, but solely upon the question as to whether it violates the provisions of the law, either statutory or common.

Swann *vs.* Swann, 21 Fed. Rep. 299.
Mosely *vs.* Nanhooser, 6 Lea, 286.

It is the purpose of the publication of an ordinance like that in question to bring it to the attention of the public, and it appears that the publication in a Sunday newspaper is the most effective notice that could be given in the city of Knoxville. If it accomplished the very purpose intended by the requirement, to publish the act, and there is neither public policy or forbidding statute to be contravened by the act of publication, it seems that no ground could be suggested why this publication is not good.

We think this is the correct view notwithstanding the very able and ingenious argument made by counsel and backed up by many authorities of high respectability, among which may be cited,

Ormsly *vs.* City of Louisville, 75 Key, 197.
Same case 4 Am. & Eng. Corp. Cases, 842.
Duman *vs.* City of Denver, 65 Pac. Rep. 580.
Sewall *vs.* City of St. Paul, 20 Minn., 511.
Scammen *vs.* City of Chicago, 40 Ill. 146.
Schwed *vs.* Hartwitz, 23 Colo. 187.

Many of these cases could be distinguished, but after all, there is a conflict of authority arising largely from a difference in the Sunday laws of the several States.

We are content with the conclusion we have reached as being the most practical and at the same time free from any valid legal objection.

320 In order to properly appreciate the very serious questions presented on the merits, it is necessary to give a short résumé of facts bearing upon the history of the water works Co., and its connection with and relation to the city of Knoxville. A condensed statement of these facts as given by counsel and which we find substantially correct is as follows:—

By the charter of the city of Knoxville, as compiled from former acts and as embodied in the acts of 1885, special session, chap. 8, section 18, subsection 7, the board of mayor and aldermen is authorized by ordinance, "to provide the city with water by water works, within or beyond the boundaries of the city, or provide for supplying the city with water otherwise."

The Knoxville Water Co. was chartered and organized under act of 1877, ch. 104, amendatory of the act of 1875, ch. 142 section 2 of that act provides, that "such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village, in which it is proposed to operate such water works, and such leave shall be certified by the mayor or recorder upon the application, and registered with it, but *this act is in no way to interfere with the police or general powers of the corporate authorities of such city, village or town, and such corporate authorities shall have power by ordinance to regulate the price of water to be supplied by such company.*"

It is insisted, and we think correctly, that it has been settled that the State, by direct enactment of its legislature, or by authority delegated by the legislature to counties or municipalities, may regulate public utilities, and the rates to be charged for public service by corporations or individuals, rendering any service to the public. This doctrine has been applied to elevators, telephones, gas companies, water companies and other public or quasi-public servants.

The leading case on this subject is that of

Munn *vs.* Warehouses, 94 U. S. 133.

See also Turnpike Co. *vs.* Croxton, (Ky.) 23 L. R. A. 177. and extensive note thereto, reviewing the various cases on the subject.

321 R. R. Commission cases, 116 U. S. 307. 347, 352.

San Diego Water Co. *vs.* San Diego, (Cal.) 62 American State Reports, 261, and extensive note thereto, reviewing many cases on the subject, p. 289.

Danville *vs.* Danville Water Co. (Ill.) 69 Am. Sr. Rep. 304.

Rogers Park Water Co. *vs.* Fergus, (Ill.) 69. Am. St. Rep. 315.

Crumbley *vs.* Water Co. 15 Pick. 420.

Spring Valley Water Works *vs.* Schottler, 110 U. S. 347. 28 L. ed. 173.

Watauga Water Co. *vs.* Wolfe, 15 Pick. 430.

Rushville *vs.* Rushville Natural Gas Co. 15 L. R. A. and note.

That such power may be delegated to a municipality, see

San Diego Water Co. *vs.* San Diego, *supra*, 15 Am. & Eng. Ency. Law, 1 ed. page 1167.

On the 1st of July, 1882, an agreement was entered into between the city and the water company in regard to the erection by the latter of water works, and the supplying for a period of thirty years, the city and its inhabitants with water, in which, among other things, it is stipulated by section 7 "Said company will supply private consumers with water at a rate not to exceed 5c. per hundred gallons"

This contract provides as follows:—

"2nd. The city further obligates itself not to grant to any other person or corporation, any contract or privilege to furnish water to the city of Knoxville, or the privilege of erecting upon the public streets, lanes or alleys, or other public grounds for the purpose of

furnishing said city or the inhabitants thereof with water for the full period of thirty years from the 1st of August, A. D. 1883." A further statement of facts is as follows: On April 18, 1891, an ordinance was enacted by North Knoxville, constituting an agreement between it and Wheeler and Parks, for the latter to supply said town and its inhabitants with water until June 3, 1913 and by section 9 of that ordinance it was provided that water to be furnished private consumers shall be charged for at "not exceeding the rates contained in the following schedules," and then sets out said schedule of rates.

That contract was subsequently assigned to the Knoxville Water Co. by Wheeler and Parks, and the town of North Knoxville
322 became consolidated with and incorporated into, the city of Knoxville.

On September 17, 1892, an ordinance was enacted by the city of West Knoxville, constituting an agreement between it and the Lonsdale-Beaumont Water Company for the supplying of water to said town and its inhabitants by said company for a period of twenty years, in which it was provided among other things, by section 9, that said company shall not charge consumers during the continuance of the franchise granted by said ordinance "exceeding the following maximum annual rates," etc., and then sets out the schedule of such rates.

Said contract was subsequently assigned by said Lonsdale-Beaumont Water Company to the Knoxville Water Company and the town of West Knoxville became consolidated with, and incorporated into, the city of Knoxville.

On October 20, 1899, an ordinance was passed by the city of Knoxville, then embracing the territory of North and West Knoxville, authorizing said Knoxville Water Company to take the assignment of said contract of the Lonsdale-Beaumont Water Company, to supply water to the inhabitants of the territory of West Knoxville, upon certain conditions, among which was, that they should furnish to the inhabitants of such territory water at a maximum "rate not exceeding that fixed in the ordinance and contract of September 17, 1892," and further that they should supply to the inhabitants of the balance of the city of Knoxville, water, "at a maximum rate, not exceeding that fixed by the contract of July 1, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company."

On May 17, 1895, the city passed an ordinance regulating the supplying of water by meter, and fixed the rates and charges therefor to private consumers, and these rates were incorporated into the schedule of rates of the defendant in force on October 20, 1899.

On July 27, 1900, the city passed another ordinance regu-
323 lating and fixing the rates generally to be charged to consumers of water, at a lower rate than that fixed by the schedule in force on October 20, 1899, and repealed all former ordinances in conflict therewoth.

Again on March 30, 1901, the city re-enacted this ordinance of

July 27, 1900, with slight amendments, fixing the same schedule of water rates as those set out in the ordinance of July 27, 1900.

The present suit arises under the last ordinance. The question of whether the rates fixed by the ordinance in question are reasonable had been pretermitted in the proof and not considered in this case.

It is insisted that it has been held that when the power to regulate rates for public service of a public corporation is delegated to a city, the city becomes invested with such power as a public trust, and cannot divest itself thereof by contract.

Huron Water Co. *vs.* Huron, (8 Dak.) 30 L. R. A. 848.
Ogden City *vs.* Ogden City Water Co. (Utah) 41 L. R. A. 305.

Again, the State, (and of course a city) cannot contract away its police power, or limit its exercise by contract, and this is conceded.

Bowman *vs.* R. R. Co. 125 U. S. 485.
Stone *vs.* Miss. 101 U. S. 814.
Butchers' Co. *vs.* City Co. 111 U. S. 746.
Gas Co. *vs.* Light Co. 115 U. S. 50.
Mugler *vs.* Kansas, 123 U. S. 624.
New York *vs.* Mila, 11 Peters, 139.

But it is denied that such a case is presented in the one at bar.

The matter of controversy in this case will first be treated from the standpoint of a contract, outside of the operation of the police powers of the municipality.

Treating the regulation of rates, as a matter of contract it has been held that a "charter specification of rates which it shall be
324 lawful for a turnpike company to charge, subject to certain increase or decrease, if necessary to keep the companies' dividends within certain limits, does not constitute an irrevocable contract between the State and the corporation, but is merely an indication that such rates are supposed to be reasonable, without precluding the subsequent exercise of legislative power to change the rates."

Turnpike Co. *vs.* Croxton, (Ky.) L. R. A. 177.
See notes to this case for a general discussion.

In the case of Danville *vs.* Danville Water Co. (Ill.) 69 Am. St. Rep. 304, the court held:—

"The legislature has the power to regulate the rates at which water shall be supplied to the public by a water company, especially where such right is reserved by the statute under which said company was incorporated.

"Municipal corporations can exercise only such powers as are conferred upon them by their charters. All persons dealing with them must see that they have power to perform the proposed act.

"The statute empowering a city to authorize a private corporation to construct water works, and to contract for a supply of water for a period not to exceed 30 years, gave no power to the city to bind itself by fixing a rate at which it must pay for such supply for such entire period, and an ordinance fixing the rate for the entire 30 years is void.

"Although a city has been empowered by statute to authorize a

private corporation to construct water works, and to contract for a supply of water, not to exceed thirty years, a subsequent statute empowering any city in which a private corporation has been, or may be authorized to supply water for public use, to fix reasonable water rates, is constitutional, and an ordinance passed under the later statute reducing existing water rates, and fixing them at a reasonable price is valid, although the city enacting it has, under the earlier statute, attempted by ordinance to fix water rates at a certain figure for the entire unexpired period of 30 years."

325 Danville *vs.* Danville Water Co. 69 Am. St. Rep. 304.

"To the same effect see the decision in the case of Rogers Park Water Co. *vs.* Fergus, 178 Ill., 571, cited in note to the foregoing case at page 315.

"It is there held that an ordinance fixing the rates for the full period is merely a declaration that such rates are reasonable at the time when the ordinance was enacted, and that the city is not bound to recognize such rates as reasonable for the full period, and has power to fix the water rates so as to make them reasonable at any time, or from time to time, as changed conditions may affect the reasonableness of the water rates formerly established, and that mandamus will lie at the suit of a citizen to compel the water company to furnish him with water at the changed rates, provided they are reasonable.

"In the case of San Diego Water Co. *vs.* San Diego, from California, 62 Am. St. Rep. 261, the power to regulate water rates is recognized and enforced with the like qualification that they must be reasonable.

"The case of Rogers Park Water Co. *vs.* Fergus, cited above and of Danville *vs.* Danville Water Co. and also the additional case of Freeport Water Co. *vs.* Freeport, all from the supreme court of Illinois, were taken by writ of error to the Supreme Court of the United States, and on March 25, 1901, were affirmed.

"21 Supreme Court Reporter, 490, 493, 505.

"In these cases the Supreme Court of the United States held that municipal corporations may be invested by statute with the power to bind themselves by an irrevocable contract and to regulate rates, but such power must be conferred in explicit terms, and that a contract concerning governmental functions, as one which affects the right of a city to regulate rates of a water company, must be strictly construed, and such functions cannot be held to have been contracted away by doubtful or ambiguous provisions, and further that an ordinance granting an exclusive franchise to the water company,

326 with the right to use the streets, requiring the municipality to pay certain rentals, and binding the company among other things, to furnish an adequate supply of water, does not give a contract right to charge the rates named in the ordinance for the whole period of the franchise, by virtue of the provision that the grantee 'shall charge the following annual rates to consumers during the existence of this franchise,' as this is merely a regulation of the

right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise."

It will be seen from an inspection of these cases that the Supreme Court was divided in opinion, the minority relying upon the cases hereafter cited by the defendant as controlling. This difference as we understand it, extends not only to the question of the power of the State to authorize an irrevocable contract but likewise whether the regulation of rates is within the police power.

In a very able and exhaustive argument, counsel for the water company insists that the ordinance of March 30, 1901, impairs the obligations of prior contracts made by the city with the defendant company, and is therefore void and in support of this contention are cited:

Constitution United States, sec. 10, art. 1.
Constitution, State of Tenn. sec. 20, art. 1.
New Orleans Water Works Co. *vs.* Rivers, 115 U. S. 674.
New Orleans Gas Light Co. *vs.* Louisiana, 115 U. S. 650.
St. Tammany Water Works Co. *vs.* New Orleans Water Works Co. 120 U. S. 64.
Walla Walla *vs.* Walla Walla Water Co. 172 U. S. p. 1.
Los Angeles Water Co. *vs.* Los Angeles, 177 U. S. 570.
Santa Ann- Water Co. *vs.* Town of etc. 56 Fed. Rep. 671.
Bank of Ill. *vs.* Akron City, etc. 76 Fed. Rep. 671.
Old Colony Trust Co. *vs.* City of Atlanta, 83 Fed. Rep. 42.
Los Angeles City Water Co. *vs.* Los Angeles, 88 Fed. Rep. 720.
City of Cincinnati *vs.* Cameron, 33 Ohio 330.
Cable Co. *vs.* Baltimore, 66 Fed. Rep. 140.
Los Angeles Water Co. *vs.* City of Los Angeles, 103 Fed. Rep. 711.
Crosby *vs.* City Council of Montgomery, 108 Ala. 498.
State *ex rel. vs.* La Clede Gas Light, 102, Mo. 472.

We do not deem it necessary to comment upon all these
327 authorities, but will notice some of those most relied upon and most nearly in point.

The case of Los Angeles Water Co. *vs.* Los Angeles, 177 U. S., 570, is much relied on.

Attention is called to the fact that Justice McKenna, who delivered the opinion in the Los Angeles case above cited, delivered the opinions in the Illinois cases, *supra*, and he rested it upon the ground that express authority had been granted to Los Angeles to enter into a contract limiting its power to regulate water rates. It is said on page 470 of the opinion, that "it is not denied that a city had the power to regulate rates."

"The contract of July 22, 1868, with the water Co. provided that the mayor and common council of said city shall have, and do reserve, the right to regulate the water rates charged by said party of the second part, or their assignees, provided that they shall not so reduce water rates or so fix the price thereof, as to be less than those charged by the party of the second part for water." pp. 560, 570. On April 2, 1870, the legislature for California passed an act, held

in that case to be valid, ratifying and confirming said contract. pp. 561, 571. It is therefore held that since the city had entered into this contract by such legislative authority, and that the contract did not grant the power to regulate rates, which power was already existent, but was a contract to limit that right, the city had no power by ordinance to violate it.

"It will be further observed that this case arose under acts and contracts made before the adoption of the constitution of California, of 1879, providing for the regulating of water rates. pp. 567.

"In the case of Old Colony Trust Co. *vs.* City of Atlanta, 83 Fed. Rep. 39, it is held that the city could not regulate street-car fares, because no such power had ever been delegated to the city. The city asserted such power under the provisions of its own charter, and also those of the charters of the street car companies, but
328 the court upon construing those charters, held that they granted no such power.

"The charter of the street car company granted certain franchises and privileges to the company, 'provided that the rates and fares on said railroad shall be subject to the approval of the mayor and city council of the city of Atlanta.' In the city ordinance granting to this company the use of the streets etc., it was provided that the charges for passage on said road shall not exceed 20 cents for any through line, and 10 cents for half lines or short distances.

"The court declines to express an opinion as to whether this constituted a contract between the city and the company, but said that if the proviso in the railroad company's charter granted any power to regulate, it was exhausted upon its first exercise. But the court does not determine what effect would be given to a direct gain of power to the city to regulate fares, instead of this mere reservation out of the franchises granted to the railroad company, and further held that the power to approve, such as was reserved in this charter, is not equivalent to the power to regulate and fix rates. See p. 42.

"The case of Santa Anna Water Co. *vs.* Town of Buena Ventura, 56 Fed. Rep. 339, simply holds that the constitution of California of 1879, requiring annual regulation of water rates, would not avoid a valid contract previously entered into by a city, with a water company, authorizing the water company to fix its own rates. The case has no application to the questions involved in the present case."

The case of Walla Walla *vs.* Walla Walla Water Co. 172 U. S. 1, is a case somewhat peculiar in its facts. By an act of the Territory of Washington, incorporating the city of Walla Walla it was enacted that it should have power to provide a supply of water and to grant the use of the streets for a term not exceeding 25 years, provided none of the rights and privileges herein granted shall be exclusive nor prevent the council from granting the same rights to others.
329 The city in pursuance of this act, passed an ordinance in 1887, granting to the company the right to lay, place and maintain all necessary water mains, pipes, connections and fittings in all the highways, streets and alleys of the city for the purpose of furnishing water. In 1893, it passed another ordinance to provide a system of water works of its own, and one of the questions pre-

sented was its power to pass the latter ordinance. The court said: "The case upon its merits depends largely upon the power of the city under its charter. The ordinance authorizing the contract which purports to have been passed in pursuance of the charter, declared that until such contract be avoided by a court of competent jurisdiction, the city would not erect, maintain or become interested in any water works except the ones established by the company, while the ordinance of June 20, 1893 provided for the immediate construction of a system of water works by the city, for the purpose of supplying the city and its inhabitants with water. Upon the face of the two ordinances there was a plain conflict, the latter clearly impaired the obligation of the former. The city contended that the original ordinance was beyond its power to make, first, because it created a monopoly not authorized expressly or impliedly by legislative grant and was void as being in contravention of public policy. 2nd, that it was an attempt to contract away a part of the governmental powers of the city council and for other reasons which we need not notice.

The court held that as the original contract was limited to 25 years, and was not an exclusive grant, that it was not beyond the power of the city council; that if it had been exclusive it would have been a monopoly and objectionable unless authorized by express sanction of the legislature. The court further held that the contract would be void if it interfered with the police power of the city, and this police power extended to the peace, good order, health and morals of the inhabitants and if de-terious to them it might be controlled by the city, or the contract entirely abrogated under the police authority of the city, but the court held that the matter of the contract did not fall within the police power but the con-
330 tractaril power of the city.

In the case of The State *ex rel.* City of St. Louis *vs.* The La Clede Gas Light Co., 102 Mo. 472, 483, the charter of the company granted by the State authorized the company to fix the price of gas manufactured by it, and it was held that such price could not be diminished by subsequent legislative action, State or municipal. It was further held that the regulation of the price of gas by the State or by municipalities created by it is not the exercise of a police power which cannot be abrogated by contract. * * * It may be said that under the grant from the legislature in the Mo. case, it was intended to remove the company from the exercise of the police power of the State over it, in so far as its rates of charge were concerned.

While not assenting to the views expressed in that case we think this case clearly distinguishable from the present one under consideration in that the legislature in the Missouri case intended to put the question of rates beyond future control of the State or municipality and beyond its police regulation, while in the present case under section 2 of the charter it was clearly intended to keep the question of rates under control and to treat them as subject to police supervision.

Under the cases we have cited and others that might be collated,

it is, we think, apparent that the authorities are not agreed as to whether the State can by legislative grant empower a municipality to enter into an irrevocable and perpetual contract with a water company or other private or quasi-public corporation for a system of water works and a supply of water, and whether such company can by legislative grant be removed from the supervision of the police power of the municipality, yet we think there is no question but that in order to do so, the legislative grant must be unquestionable and admit of no other construction, but must be plain, positive and unequivocal. If the municipality has no such power under legislative grant, it can make no such contract nor can it waive its police powers or refuse to exercise them when the good of the citizens of the municipality demands.

331 What matters fall within the scope of the police powers of the State or of a municipality, has never been definitely determined. A large number of subjects have been embraced, such as the public health, the public morals, the public safety and the general and comprehensive clause of the public welfare, and after the consideration of all the subjects under these and other general heads, the text books announce that there are also other instances. Different jurisdictions lay down different rules and limits. In Theilan *vs.* Porter, 14 Lea, 620 " the safety and tranquil-ity of the community and the orderly existence of the government is included in the enumeration. As to what may be done under this power, see generally Dillon on Municipal Corporations, page 95, section 71, N. 141, 142, 244, 314, 752, note page 920. 8 Ency. Law, 1st ed. 620, 624. 18 Ency. of Law, 1st ed. 752. Harbison *vs.* Iron Co. 19 Pick. 423. Leeper *vs.* The State, 19 Pick. 503. Dayton *vs.* Barton, 19 Pick. 604. State *vs.* Martin, 2 Shannon, 555. L. & N. R. R. Co. *vs.* Burke, 6 Col. 50.

It was said in Stone *vs.* Mississippi, 101 U. S. 814: 'No legislature can bargain away the public health or the public morals.'

While the rate to be paid for water is not so palpably a regulation within the police supervision of a city, as is the purity and supply of the water furnished, yet the rate of charge is a matter which affects the health, welfare and comfort of the city, since if rates are unreasonably high they will prove a restriction upon the use of water, which may seriously impair the health and interfere with the comfort and welfare of the prople, especially the poorer classes, who by reason of high prices may be cut off from the benefit of the water, partially or altogether.

The case of Los Angeles City Water Co. *vs.* Los Angeles, 88 Fed. Rep. 720 (same case, 177 U. S. 558) is relied on to show that a city may waive or renounce its right to regulate water rates but as we have before stated, it appears that express authority was given to that city in its charter to enter into a contract limiting its power to regulate rates, the language of the charter being in

332 substance that the city may regulate the rates "*provided they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged by the parties of the second* part (the water Co.) for water."

But the difference in that case and the present is, that by the

charter of Los Angeles, the city had the express power to make an irrevocable contract while in this case, the city of Knoxville is not by its charter granted such a right, but the proper construction of the charter is, we think, that the city shall have *a continuing right to regulate the charges for water, limited only by a condition that such rates shall not be unreasonable and oppressive.* As before stated, this question of reasonableness or unreasonableness of rates is not considered in the present case, but seems to have been waived by consent.

It is said that it is unreasonable to give to the city of Knoxville the right to regulate the water rates of the company when it is itself the principal party to be affected by such rates, and in this connection the language of Mr. Justice Jackson in Cleveland Gas Light & Coke Co. against The City of Cleveland, 71 Fed. Rep. 614 is cited as follows:—

"It would be a fearful proposition—monstrously absurd and outrageous, if the legislature which undertook to confer upon a citizen of Cleveland, the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished, the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The city of Cleveland has undertaken to do that thing * * * The thing cannot be done and ought not to be done."
71 Fed. Rep. 614.

But the fallacy, as we think, in this argument lies in the fact that the question of the reasonableness or unreasonableness of
333 the rates is always open to judicial investigation, and while it may safely be said that the legislature cannot constitutionally delegate the power to fix prices at which water shall be sold in a city to the authorities of the city, which is itself a consumer, either in its municipal capacity, or through its inhabitants without liability to a judicial investigation of the reasonableness of the rates fixed by such authorities. Still if no such provision is made in an ordinance, the law will imply one and preserve to the company its right to litigate the question upon that ground. We do not think it necessary that the provision be incorporated in the contract or in the ordinance, but it will be implied when not expressly provided for.

It is said in addition that the city has an option to purchase the plant after 1898, and the argument is made that the city authorities by oppressive legislation and ordinances may make the plant unproductive and less valuable in order to secure it at less than it is worth, but in answer to this we think we can safely say the defendants may protect themselves against such action and results by a recourse to the courts and protection against ordinances which are intended to, or do, have such results. No such case is before us now as the question of the income and profits of the water company has not been opened up nor considered, and the naked question here, being the power to regulate the rates as the city in its judgment may deem right and just.

Recurring again to the provision in the second section of the charter, act of 1877, ch. 104, we think that its proper construction is, that nothing in it and no power granted by it *to the corporation to contract for and provide water shall in any way interfere with the police or general powers of the city, and it expressly provides that such corporate authorities shall have power by ordinance to regulate the price of water to be supplied by such company.*

It is to be noted that defendant's counsel insist that the
334 proper construction of section 2 of the charter of the city is that, while the city originally had the power to regulate the price of water to be supplied by the company, it is not a continuing right, but that having once exercised it, its power was exhausted, and having once made a contract for a certain schedule of rates it is bound by such contract. The contention is forcibly put as follows:—

The city was the "master of the situation;" if it chose to refrain from making a contract, it might exercise the power of regulation, limited only by what would be unreasonable and oppressive. But if it should exercise the power vested in it, and specially conferred upon defendant company, and enter into a contract with said company for the use of water, and agree upon prices for the use of such water, then it became bound by that provision of the Constitution of the United States, which is written into every contract, that it is sacred from alteration change or impairment except with the consent of the other party. And it is said:—If such were not the case, what city could persuade parties to invest their capital in improvements, which to be profitable, must either be permanent or continue for such a length of time as to enable the investor to receive some return upon the amount invested by him? A different construction would be disastrous to the interests of the city.

In Freeport Water Co. *vs.* Freeport, 21 Sup. Court Rep. 498, it is said:—

"This power of regulation is a power of government continuing in its nature and if it can be bargained away at all it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power."

In the words of Chief Justice Marshall, in Providence Bank *vs.* Billings, 4 Peters, 514, 561, L. ed. 939, 955, its abandonment ought not to be presumed in a case in which the deliberate pur-
335 pose of the State to abandon it, does not appear. In that *case the term used, was "at such rates as may be fixed by ordinance."* It was said, the words "*fixed by ordinance*" may be construed to mean by ordinance once for all to endure during the whole period of thirty years or by ordinance from time to time as might be deemed necessary. Of the two constructions that must be adopted, which is most favorable to the public, not that one which would so tie the hands of the council that the rates could not be adjusted as justice to both parties might require at a particular time.

The language of the city charter in the present case is not that the corporate authorities shall have power by ordinance *to fix*, but

to regulate the price of water to be supplied by such company, and in the same connection the full police and general powers of the corporation are reserved to it.

We are of opinion that the right to regulate rates was not exhausted by an agreement at any particular time upon a schedule of prices, but it is a continuing right under the terms of the charter, but not to be exercised arbitrarily and unreasonably, and when rates are so reduced as to become oppressive upon the company, and so as not to yield a fair income on the investment, the courts can interfere upon a proper showing and restrain such action. As has been very tersely said—a reasonable rate the law assures even against governmental regulation.

21 Sup. Ct. Reporter, p. 497, Rogers Park Co. *vs.* Fergus.
21 Sup. Ct. Reporter, p. 498, Freeport Water Co. *vs.* Freeport.

The rates adopted by the ordinance are not shown by the proof to be unreasonable, and the ordinance is not sho*nw* to be oppressive, and its violation subjects the defendant to the penalties imposed.

The judgment of the court below is reversed and judgment will be entered in this court as herein indicated.

WILKES, *J.*
WILKES, *J.*

336 Supreme Court of Tennessee, at Knoxville, September Term, 1901.

THURSDAY, *November* 7, 1901.

Court met pursuant to adjournment,

Present and presiding the Hon. Chief Justice D. L. Snodgrass, and the Hon. Associate Justices W. C. Caldwell, John S. Wilkes, W. K. McAlister and W. D. Beard.

The minutes of yesterday were read and signed, when the following proceedings were had, to wit:—

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE *vs.* KNOXVILLE WATER COMPANY. } Reversed.

This cause came on to be heard on this the 7th day of November, 1901, before the honorable, the judges of the supreme court of Tennessee, sitting at Knoxville, on the transcript of the record from the circuit court of Knox county, the assignments of error on behalf of plaintiff in error, Mayor and Aldermen of the City of Knoxville, the reply thereto by the defendant, Knoxville Water Company, and the briefs and argument of counsel, from all of which the court is of the opinion that the ordinance of March 30th, 1901, upon which this suit is based is not in contravention or violation of the Constitution of the United States, article 1, section 10, or of section 1 of the 14th amendment to said Constitution, but that said ordinance is a valid and legal ordinance and was properly passed under the power and authority invested in plaintiff, that its publication in a Sunday edition of a newspaper under authority of plaintiff was a valid and

legal publication of said ordinance as required by the charter of the plaintiff, and that the defendant is guilty of the violation of said ordinance as charged in the warrant issued in this case, and that there is therefore error in the judgment of the circuit court of Knox county, adjudging the invalidity of said ordinance and dismissing plaintiff's suit, and said judgment is therefore reversed, and judgment will be entered here in favor of plaintiff, but without prejudice to defendant's right to litigate and show in such
337 way as it may be advised that the rates prescribed by said ordinance of March 30th, 1901, are unreasonable and oppressive—that question not having been considered by the court in deciding this case.

It is therefore considered by the court that plaintiff have and recover of the defendant the penalty of ten dollars as provided for in said ordinance of March 30th, 1901, together with all the costs of this suit accrued in this court and in the lower courts, for which execution may issue.

To the ruling and holding that the ordinance of plaintiff Mayor and Aldermen of the City of Knoxville, upon which this suit is based is not in contravention or violation of the Constitution of the United States, as aforesaid, the defendant Knoxville Water Company saves its exceptions.

Supreme Court of Tennessee, at Knoxville, September Term, 1901.

SATURDAY, *November* 16, 1901.

Court met pursuant to adjournment,

Present and presiding the Hon. Chief Justice D. L. Snodgrass, and the Hon. Associate Justices W. C. Caldwell, John S. Wilkes, W. K. McAlister and W. D. Beard.

The minutes of yesterday were read and signed, when the following proceedings were had, to wit:—

MAYOR AND ALDERMEN OF THE CITY of Knoxville
vs.
KNOXVILLE WATER COMPANY.
} The Assignment of Errors for the Supreme Court of the United States.

The defendant, Knoxville Water Co., by its attorney, further excepts to the action and judgment of the supreme court of the State of Tennessee, sustaining the validity of the ordinance of plaintiff, passed March 30th, 1901, being the ordinance in controversy in this cause and holding that the same is not valid and refusing to hold that said ordinance is in contravention and violation of the
338 Constitution of the United States, article I, section 10, and section 1 of the 14th amendment of said Constitution, as contended by defendant in its pleas, in its reply to plaintiff's assignments of error to the supreme court of Tennessee, and in the oral argument of its counsel before said supreme court, all of which defendant assigns as error upon said judgment.

339 Filed November 18, 1901. Alex. McMillan, clerk, by J. G. Stuart, deputy clerk.

In the Supreme Court of Tennessee, at Knoxville, September Term, 1901.

MAYOR & ALDERMEN OF THE CITY OF Knoxville, vs. KNOXVILLE WATER COMPANY.	Law Cause, Knox County.

The Petition of Knoxville Water Company, Defendant in the Above-entitled Cause.

To the Honorable D. L. Snodgrass, chief justice of the supreme court of the State of Tennessee:

Comes now your petitioner, Knoxville Water Company, by its attorney, Charles T. Cates, Jr., and respectfully shows:

First.

That on the 7th day of November 1901, in the honorable supreme court of the State of Tennessee, a judgment was rendered against your petitioner in a cause wherein The Mayor and Aldermen of the City of Knoxville was and is plaintiff, and your petitioner was, and is, defendant, for the sum of $10.00 and costs, and an execution was awarded thereon as will appear by reference to the record and proceedings in said cause.

Second.

Your petitioner further shows that the supreme court of the State of Tennessee is the highest court in said State in which a decision in said suit of The Mayor and Aldermen of the City of Knoxville against your petitioner could be had.

Third.

Your petitioner further shows that it is aggrieved by the aforesaid judgment against it and claims the right to remove
340 said judgment to the Supreme Court of the United States, by writ of error under the statutes of the United States authorizing writs of error to the State courts, because said judgment against your petitioner was rendered upon an ordinance of plaintiff, Mayor & Aldermen of the City of Knoxville, which is a municipal corporation under the laws of the State of Tennessee, and which ordinance your petitioner claimed and alleged in said suit, and still claims and alleges was in contravention and violation of the Constitution of the United States, article 1, section 10, and section 1 of the 14th amendment to said Constitution, in that, said ordinance impaired the obligations of the contracts existing between your petitioner and said Mayor and Aldermen of the City of Knoxville, and deprived your petitioner of its property and liberty without due process of law:

The decision of the honorable supreme court of the State of Tennessee on said claim and contention of your petitioner was adverse thereto, all of which appears by the record of the proceedings in said cause, and which is herewith submitted.

Wherefore, your petitioner prays the allowance of a writ of error and supersedeas returnable into the Supreme Court of the United States, and for citation and supersedeas:

And so will your petitioner ever pray.

KNOXVILLE WATER COMPANY,
By CHARLES T. CATES, JR., *Attorney.*
CHARLES T. CATES, JR.,
Attorney for Petitioner.

341 Filed November 18, 1901. Alex. McMillan, clerk, by J. G. Stuart, deputy clerk.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Tennessee, Northern Division.

The President of the United States of America to the honorable the judges of the supreme court of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Tennessee before you, or some of you, being the highest court of law or equity of the said State of Tennessee, in which a decision could be had in said suit between The Mayor and Aldermen of the City of Knoxville, a municipal corporation, plaintiff, and Knoxville Water Company, a corporation, chartered and organized under the laws of the State of Tennessee, wherein was drawn in question the validity of an ordinance of said municipal corporation, or an authority exercised by said plaintiff, municipal corporation, under said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of said defendant Knoxville Water Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the
342 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the

United States, the 18 day of November, in the year of our Lord one thousand, nine hundred and one.

[The Seal of the Circuit Court, District of East Tenn.]

HENRY O. EWING, *Clerk*,
By J. T. CARTER,
Deputy Clerk of the United States Circuit Court, Sixth Circuit, Eastern District of Tennessee, Northern Division.

Allowed to operate as a supersedeas by—
D. L. SNODGRASS,
Chief Justice of the Supreme Court of the State of Tennessee.

A true copy of the above and foregoing writ of error was lodged with me in this office of the clerk of the supreme court of Tennessee, at Knoxville, on the 18th day of November, 1901, at 11 o'clock a. m.
ALEX. McMILLAN, *Clerk*,
By J. G. STUART, *D. C.*

343 Filed November 18, 1901. Alex. McMillan, clerk, by J. G. Stuart, deputy cl'k.

In the Supreme Court of Tennessee, at Knoxville, Tennessee.

MAYOR & ALDERMEN OF THE CITY OF KNOXVILLE
vs.
KNOXVILLE WATER COMPANY.

Know all men by these presents, that we, Knoxville Water Company of Knoxville, Tennessee, principal and H. B. Branner and Charles T. Cates, Jr., sureties, are held and firmly bound unto the Mayor & Aldermen of the City of Knoxville in the penal sum of five hundred dollars, *dollars*, to be paid to said Mayor & Aldermen of the City of Knoxville, its legal successors or assigns; for the payment of which, well and truly to be made, we bind ourselves, successors, our heirs, executors and administrators, jointly and severally by *them* present.

Witness our hands and seals on this the 18 day of November, 1901.

Whereas, lately at a session of the supreme court of Tennessee, at Knoxville, Tennessee, in a suit pending in said court between said Mayor & Aldermen of the City of Knoxville and said Knoxville Water Company, a final judgment was entered against said water company, and said Knoxville Water Company having obtained the allowance of a writ of error, and filed a copy thereof in the clerk's office of said court to recover the judgment in the aforesaid suit, and a citation directed to said Mayor & Aldermen of the City of Knoxville, citing and admonishing it to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof:

Now, therefore, the condition of *the* this obligation is such, that if

the above-bound Knoxville Water Company shall prosecute said writ of error to effect and answer all damages and costs if it
344 fails to make said writ of error good, then the above obligation to be void; otherwise to remain — full force and virtue.

KNOXVILLE WATER COMPANY,
By CHARLES T. CATES, JR., *Attorney.*
CHARLES T. CATES, JR., } *Sureties.*
H. B. BRANNER, }

Approved to operate as a supercedeas.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of the State of Tennessee.

345 UNITED STATES OF AMERICA, *ss:*

To the Mayor & Aldermen of the City of Knoxville, a municipal corporation organized and existing under the laws of the State of Tennessee, in Knox county, Tennessee, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C. within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of Tennessee, at Knoxville, Tennessee, wherein Knoxville Water Company, a corporation chartered, organized and existing under the laws of the State of Tennessee, is plaintiff in error, and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that *bill.*

Witness, the Honorable David L. Snodgrass, chief justice of the supreme court of Tennessee, this 18 day of November, in the year of our Lord, one thousand, nine hundred and one.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

STATE OF TENNESSEE, } *ss:*
Knox County, }

On this the 18th day of November, in the year of our Lord, one thousand, nine hundred and one, personally appeared, James T. Joy, deputy sheriff of Knox county, Tennessee, before me,
346 the subscriber, clerk of the supreme court of the State of Tennessee, and makes oath that he, the said James T. Joy, delivered a true copy of the within citation to the Honorable Samuel G. Heiskell, mayor of the defendant in error Mayor and Aldermen of the City of Knoxville, and to Reuben L. Cates, attorney for the defendant in error, Mayor and Aldermen of the City of Knoxville.

JAS. T. JOY,
Deputy Sheriff.

Sworn to and subscribed on this the — day of November, 1901.

ALEX. McMILLAN, *Clerk*,
By J. G. STUART, *Deputy Clerk*.

347 Office of the clerk of the supreme court for the eastern division of the State of Tennessee, at Knoxville.

I, Alex. McMillan, clerk of said court, do hereby certify that the foregoing is a true and correct copy of the transcript and proceedings had in this court, in the case of M. & A. of Knoxville *vs.* The Knoxville Water Company, as the same appears of record and on file in my office; and I do further certify that bound with said transcript, are the original petition for writ of error and supersedeas, the citation to the Mayor and Aldermen of Knoxville, and the writ of error allowed by the Hon. D. L. Snodgrass, chief justice of the supreme court of Tennessee.

In testimony whereof, I have hereunto set my hand and affixed the seal of the court, at office, in Knoxville, Tenn., on this the 11th day of Dec., 1901.

[Seal of the Supreme Court, Knoxville, Tenn.]

ALEX. McMILLAN, *Clerk*,
By J. G. STUART, *D. C.*

Bill of Costs.

Clerk McMillan, making transcript, 137,500 words.....	137.50
Certificate and seal, .50; filg. asmt. of errors, bond, &c., 2.00..	2.50
	$140.00

Rec'd of Knoxville Water Company $140.00 in payment of above bill of cost.

This Dec. 11, 1901.

ALEX. McMILLAN, *Clerk*,
By J. G. STUART, *D. C.*

Endorsed on cover: File No. 18,354. Tennessee supreme court. Term No. 212. Knoxville Water Company, plaintiff in error, *vs.* The Mayor and Aldermen of the City of Knoxville. Filed December 16", 1901.

FILE COPY.

Office Supreme Court
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JAMES H. McKENNEY

No. 212.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1902.

KNOXVILLE WATER COMPANY,
Plaintiff in Error,

vs.

MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE,
Defendant in Error.

Error to the Supreme Court of Tennessee.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

CHARLES T. CATES, JR.,
For Plaintiff in Error.

HEBER J. MAY,
Of Counsel.

BRANDON-KNOXVILLE

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

KNOXVILLE WATER COMPANY,
Plaintiff in Error,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE,
Defendant in Error.

No. 212.

ERROR TO THE SUPREME COURT OF TENNESSEE.

May it please your Honors:

The plaintiff in error claims the right and power under its charter to contract with both defendant in error and its inhabitants for the use of its water, and to charge therefor such prices as may be agreed upon between the parties, and that not only this right and power, but also contracts and agreements entered into pursuant thereto, are protected by the Constitution of the United States, Article I, Section 10, and Section 1 of the Fourteenth amendment to said Constitution.

The defendant in error claims, under a power to regulate rates, the absolute right to alter existing contracts between both itself and many of its inhabitants and plaintiff in error, and to prevent plaintiff in error from making agreements with the consumers of its water for rates and prices higher than fixed by ordinance of defendant in error enacted arbitrarily and without the consent of plaintiff in error.

The contention of defendant in error was sustained by the judgment of the Supreme Court of Tennessee, and these questions are now, upon a writ of error, before this Court for adjudication.

STATEMENT OF THE CASE.

The defendant in error, the Mayor and Aldermen of the city of Knoxville, is a municipal corporation, and in 1882 it had in effect the same power to provide itself and its inhabitants with a supply of water as set forth in its present charter granted by the General Assembly of Tennessee at its extra session in 1885 and found in sub-section 7 of Section 18 of Chapter 8 of the Acts of the extra session for 1885, as follows:

> "Section 18. The Mayor and Board of Aldermen shall have the following powers by ordinance: . . .
> "Sub-section 7. To provide the city with water by waterworks within or beyond the boundaries of the city, or provide for supplying the city with water otherwise, and to provide for the prevention and extinction of fires, and to organize and establish fire companies."

The plaintiff in error, Knoxville Water Company, is a domestic corporation under the laws of Tennessee, and its charter was issued to it under the Act of the General Assembly of 1877, Chapter 104, Section 1. The provisions of said charter material to the present case are in substance as follows:

> 1. The business of said company shall be to establish and construct waterworks in or near the city of Knoxville, Tennessee, of sufficient capacity to furnish the corporate authorities and inhabitants of said city with water.
> 2. Said company shall have *power . . . to contract with said inhabitants and the corporate authorities of said city, or any incorporated companies, for the use of said water, and charge such price as may be agreed upon between said company and said parties.*
> 3. Nothing in said charter contained shall be construed to compel the inhabitants of said city to use the water of said company or prevent them from using water obtained in any other way.
> *Vide:*
>
> Charter, Rec. pp. 51, 2, 3.
> Acts of 1887, Ch. 104, Appendix No. 1.

Under and by virtue of the authority conferred upon plaintiff in error by its charter as hereinbefore shown and the power in-

vested in defendant in error by its charter as shown, on the first day of July, 1882, an agreement was entered into between plaintiff in error and defendant in error by the terms of which plaintiff in error (to be hereinafter referred to as the Company) in order to supply the defendant in error (to be hereinafter referred to as the City) with water for fire protection and public, sanitary and domestic purposes, stipulated the rates at which it should supply the city with water for such public purposes, and also stipulated in the 7th section of said agreement that *"said company will supply private consumers with water at a rate not to exceed five cents per hundred gallons,* provided, however, it is expressly understood that the entire cost of introducing from the mains into private premises, including cost of meter when used, shall be borne by the parties introducing or ordering the same."

Rec. p. 7.

The company was to maintain waterworks stipulated for and to be built in a condition sufficient to enable it to comply with its undertakings as stipulated for in said agreement for a period of thirty years from January 1, 1883, unless the city should become the owner of said waterworks at the appraised value thereof, at its option, after the expiration of fifteen years.

Rec. p. 10.

And the Water Company was also compelled to obligate itself not to transfer or assign said contract to any company, corporation or individual whatsoever. Rec. p. 11.

The waterworks provided for in said agreement were built thereunder and as therein provided, and it does not appear from this record that the city ever took any steps toward acquiring the plant and property of the company under the option. At the time this contract was entered into the city of Knoxville was composed of its first nine wards as it now exists, and the plant and property of the company in these nine wards were built in pursuance of said contract of July 1, 1882.

Rec. p. 121.

On April 18, 1891, Wheeler & Parks entered into a contract with the town of North Knoxville, then a separate corporate municipality contiguous to the city of Knoxville, to supply said town and its inhabitants with water, and by Section 9 of said contract it was provided as follows:

> ***"Water to be furnished private consumers shall be charged for at not exceeding the rates contained in the following schedule."***

and then follows the schedule in detail.

Rec. pp. 70, 72.

This contract between the town of North Knoxville and Wheeler & Parks, was on November 17, 1893, assigned to the Knoxville Water Company. Rec. pp. 78, 79.

In 1891, the Lonsdale-Beaumont Water Company was chartered under the Acts of the General Assembly of Tennessee for 1885, Chapter 115, for the purpose of supplying water to the town of West Knoxville, which was another separate municipality contiguous to the city of Knoxville.

Charter, Rec. pp. 57 to 61.
Acts of 1885, Ch. 15, Appendix No. 2.

On September 17, 1892, said town of West Knoxville and said Lonsdale-Beaumont Water Company entered into a twenty year contract, under and by which the Lonsdale - Beaumont Water Company agreed to erect and build a system of waterworks sufficient to supply said town and its inhabitants with water, and by Section 11 of said contract it was provided: The grantee *"shall not charge consumers during the continuance of the franchise granted by this ordinance exceeding the following maximum annual rates,"* etc.; and then follows the schedule of rates.

Rec. p. 66.

The power and authority vested in the towns of North and West Knoxville in regard to water supply are set forth in their charters in identically the same language:

"To provide the town with waterworks or contract with others for water within or beyond the town limits, for town or corporate purposes."

Acts of 1889, Ch. 28, Sec. 4, Sub-sec. 7.
Acts of 1899, Ch. 93, Sec. 5, Sub-sec. 7.

By Chapter 323 of the Acts of the General Assembly of 1897, the city of Knoxville and the towns of West Knoxville and North Knoxville were consolidated, and by Section 8 of said Act it was expressly provided that all contracts of the towns of West Knoxville and North Knoxville shall be carried out and performed by the Mayor and Aldermen of the City of Knoxville, which was the corporate name given to the consolidated municipality, which is the defendant in error in this Court.

On February 9, 1888, in order to compromise certain litigation which had been pending between the company and the city relative to hydrant rentals, and which had resulted in a judgment in favor of the company, a *modification of the contract of July 1, 1882, was agreed upon by both parties to said contract, by which the annual rentals for hydrants were materially reduced.*

Rec. pp. 47, 48, 121.

Previous to the consolidation of the three municipalities, as hereinbefore set out, the water company had voluntarily published and put into operation a schedule of rates and charges for the use of water very much below the price stipulated in the contract of July 1, 1882, in that the maximum charge for metered water was fixed at the rate of two and a half cents per one hundred gallons, or twenty-five cents per thousand gallons, as against five cents per one hundred gallons or fifty cents per thousand gallons provided in said contract of July 1, 1882; and further providing as the unit of charge, or as it is sometimes called, the fixture charge, an annual rate of $6 for a house containing four rooms or lesss.

Rec. pp. 87, 91.

Subsequent to the publication of this schedule of rates and charges, and on the 17th day of May, 1897, the City of Knoxville

passed an ordinance assuming to regulate meter rates to be charged by the water company, *but in fact only adopting the meter rates then in force by the water company.*

Rec. pp. 49, 50.

By the Act of Consolidation, the town of West Knoxville became the Tenth Ward, and the town of North Knoxville became the Eleventh Ward of the City of Knoxville.

Acts of 1887, Chapter 323.

On the 20th day of October, 1899, the defendant in error, Mayor and Aldermen of the City of Knoxville, passed an ordinance granting its corporate assent and approval to the consolidation of the Knoxville Water Company, then doing business in the first nine wards and the eleventh ward of the City of Knoxville, and the Lonsdale-Beaumont Water Company, then doing business in the tenth ward of the City of Knoxville, into one corporation under the name of the KNOXVILLE WATER COMPANY, to be effected by consolidation, purchase, lease or otherwise; but this consolidation was granted upon certain express conditions reserved by the City, to-wit:

1. The rates provided by the Lonsdale-Beaumont contract of September 17, 1892, were guaranteed to the inhabitants of the Tenth Ward, formerly the town of West Knoxville.

2. Filtered water to all the inhabitants of the City of Knoxville.

3. A continuance of the rates then in force by the Knoxville Water Company to all the inhabitants of the remaining wards other than the Tenth Ward of the City of Knoxville.

4. The option and right to purchase reserved by the city in its contract of July 1, 1882, with the Knoxville Water Company, and covering only the property of said Company, should be extended to all the property of the Knoxville Water Company which it then owned or might afterwards acquire, or which might be acquired by said consolidated company.

Rec. pp. 13, 14.

The Knoxville Water Company accepted the obligations imposed upon it by this ordinance of October 20, 1899, and the same thereupon became a part of the contracts existing between the Company and the City as fully as if the provisions of said ordinance were embraced in formally written contracts executed by and between said City and said Company.

Rec. pp. 15, 16.

On January 1, 1900, the consolidation provided by the ordinance and contract of October 20, 1899, was effected by a conveyance by the Lonsdale-Beaumont Water Company, of all its property, franchises, contracts, etc., to the Knoxville Water Company, and this conveyance was duly recorded in the office of the Secretary of State, as provided by law. Rec. pp. 80--84.

On July 27, 1900, and *less than a year after the execution of the contract and passage of the ordinance of October 20, 1899, the City of Knoxville, for the first time since the execution of the contract of July 1, 1882, arbitrarily, and without the consent of the* ***Water Company,*** attempted to pass an ordinance regulating water rates and charges to be enforced by the water company, and materially lowering the same, but this ordinance was conceded to have been defective, and is only noticed because it was in substance re-enacted and the defects therein contained remedied.

Rec. pp. 113--117.

On March 30, 1901, an ordinance was passed in lieu of, or as an amendment to, the aforesaid ordinance of July 27, 1900, but in substantially the same terms, regulating and fixing the rates to be charged consumers of water. Rec. pp. 19--23.

By this ordinance of March 30, 1901, the rates were materially changed and decreased from those then being enforced by the Knoxville Water Company under the contract of July 1, 1882, and the ordinance contract of October 20, 1899. This is undisputed. And by Section 3 of said ordinance, it was provided as follows:

Section 3. *Be it further ordained,* That it shall be unlawful for any person, company, firm or corporation, or their officers, agents, servants or employees, supplying water to the inhabitants of the city of Knoxville, to charge, demand or collect for water so supplied more than the rates hereinbefore set forth in Section "1" of this ordinance; and it shall also be unlawful for any such person, company, firm or corporation, or their officers, agents, servants, or employees to cut off or otherwise interfere with the supply, or refuse to furnish a supply of water to any consumer for failure to pay for same, provided such consumer tenders, in lawful money, the charge for such water at the rates aforesaid, and any violation of the provisions of this section of this ordinance shall be a misdemeanor, and upon a conviction thereof before the Recorder the offender *shall be punished by a fine of not less than* $10 *nor more than* $50 *for each offense."*

THIS IS THE ORDINANCE UPON WHICH THE QUESTIONS TO BE DECIDED IN THIS CASE ARE PRESENTED.

The ordinance was published under the direction of the city authorities, in the *Knoxville Journal and Tribune,* in its issue of Sunday, March 31, 1901. Rec. p. 23.

It was claimed in the trial court, and also on appeal, that inasmuch as publication was necessary to make the ordinance valid and to put it in force, that its publication in the Sunday newspaper was illegal, and therefore that the ordinance was invalid and not in force. It was shown to be the object of the city authorities to have the ordinance go into effect before April 1st, in order to have the change and reduction in water rates go into force on or before that date, inasmuch as all water bills due the Company were payable quarterly in advance on the first days of January, April, July and October. Rec. p. 94.

Section 7 of the charter of the City (Section 7 of Chapter 8 of the Acts of 1885, extra session) provides that the Board of Mayor and Aldermen shall hold meetings at such times as it may deter-

mine, not to exceed *two regular meetings per month;* and the regular meetings provided for were on the first and third Friday nights of each month. It is further provided in the charter of the City, Section 9, that "no bill or ordinance shall become a law without first having been read and passed at three several meetings by a majority vote, on the third of which readings a majority of the whole number of the members of the Board shall be required." And further, that the Mayor, "whenever in his judgment the good of the city requires it, may call special meetings of the Board of Aldermen, and when so called, he shall state, by message, the object for which it shall have been called, and the business of such meeting shall be restricted to the object so stated."

The ordinance in question was introduced at a special meeting on March 9, 1901, and as three readings were required, each reading at a separate meeting of the council, it followed that it would be necessary to hold special meetings in order to pass the ordinance before April 1, 1901, and therefore special meetings were held, not only on March 9th, but also on March 30th, at which the ordinance was passed on its third and final reading; and it was passed on its second reading at the regular meeting on March 15, 1901.

Rec. pp. 38, 39, 40.

The Board of Aldermen was composed of one alderman from each of the eleven wards of the city, and no notice of the special meeting of March 9, 1901, was given to Aldermen Aiken, Trigg, and Cleage, but only Trigg and Cleage were absent from the meeting, the former having resigned and removed from the city.

Rec. p. 97.

No notice of the special meeting of March 30, 1901, was given to Alderman Cleage, and no attempt was made to notify him. He was temporarily out of the city at the date of both the special meetings, which were called only a few hours before the meetings were held.

Rec. pp. 98, 110, 211, 215.

He was engaged during the month of March and on March 9th and 30th, in his work as Law Agent for the Southern Railway Company, in the State of North Carolina.

Rec. p. 110.

The Knoxville Water Company, the plaintiff in error here, being advised that said ordinance of March 30, 1901, had never been passed in such manner as to make it a valid ordinance of the City of Knoxville, and being further advised that even if said ordinance was in form and manner of passage a valid ordinance, that it was void because in contravention of the Constitution of the United States, Article I, Section 10, and of the first section of the Fourteenth Amendment to said Constitution, continued to charge its consumers the rates provided in the contract and ordinance of October 20, 1899, which (with the exception of some of the rates in the Lonsdale-Beaumont contract) were slightly in excess of the rates and charges provided in said ordinance of March 30, 1901.

Rec. p. 209.

Thereupon, the City of Knoxville, defendant in error here, for the purpose of enforcing said ordinance of March 30, 1901, brought suit on the first day of May, 1901, in the name of the Mayor and Aldermen, by warrant issued by its Recorder, against the Knoxville Water Company, plaintiff in error here, by which suit it sought to collect a penalty of "not less than $10 nor more than $50" for charging, demanding and collecting from one *W. K. McClure* for water furnished and to be furnished him, more than the rates fixed therefor by the ordinance of said City passed and approved on March 31, 1901, as aforesaid.

Rec. pp. 1, 2.

The Water Company was arrested, and upon its plea of not guilty the Recorder of defendant found said Company guilty as charged and imposed a fine or penalty of fifty dollars to be paid into the treasury of the City, together with costs of the cause, in default of which it was adjudged that the Water Company be

committed to the workhouse until said fine and costs were paid. An appeal was prayed and granted.

Rec. p. 2.

The *W. K. McClure* mentioned in said Recorder's warrant was the agent for a man by the name of *J. S. Gratz,* who then lived in the city of Chicago, but was the owner of three houses and lots in the city of Knoxville and outside of the Tenth Ward. In 1896 the Water Company made a contract with said Gratz to supply water to the premises owned by him, which said contract is as follows:

"KNOXVILLE WATER COMPANY, Service No. 2850.
KNOXVILLE, TENNESSEE, September 17, 1896.

The undersigned hereby applies to the Knoxville Water Company for a supply of water at premises No. 706 High Street, owned by J. S. Gratz, occupied by tenants, to be used for domestic purposes only, and I hereby agree to use and pay for the same in accordance with the rates, rules and regulations of the Knoxville Water Company as now or hereafter in force, and which are made a part of this contract.

And I further agree that said Company may enter upon any land owned by me and in which I may have such right, and place therein, upon the terms provided therefor, all the pipes that may be used for furnishing such supply, and may cause the same to be inspected and repaired at any future time as occasion may require.

J. S. GRATZ, *Owner,*
By W. K. MCCLURE, *Applicant.*"

Rec. pp. 25--126.

The Water Company has about 4,000 individual consumers or patrons with whom it has contracts similar to said Gratz contract above set out, and to whom said company was engaged in furnishing water under the rates provided in said ordinance-contract of October 20, 1899. Rec. p. 126.

It is not improper to state here that the total amount of the water bills for the three premises in dispute for the quarter beginning April 1, 1901, and ending June 30, 1901, was $7.27 (Rec. p. 86), and that the difference between the rates charged by the

Water Company on these three Gratz premises in accordance with the terms of its contracts of July 1, 1882, on October 20, 1899, and the ordinance of March 30, 1901, was $1.15; that is, 50 cents, 42 cents and 23 cents. These rates for water, while rendered to *McClure* as agent for *Gratz*, were in fact paid out of funds belonging to *Gratz*. Rec. pp. 86, 87, 210.

On appeal in the Circuit Court of Knox County the Company pleaded not guilty; and also by way of special pleas averred that the ordinance of March 30, 1901, was void, because it violated the Constitution of the United States in that it impaired the obligations of the contracts between the City and the Water Company, and also because it deprived said Company of its property and liberty without due process of law. The other special pleas relate to the oppressiveness and unreasonableness of the provisions of the ordinance, to its interference with the existing contracts between said company and its patrons, to the excessiveness of the penalty to be assessed, and to the denial that the company owed the City, as alleged in the warrant. Rec. pp. 3, 5.

The case was brought to trial in the Circuit Court without a jury, and the Court having made a special finding (Rec. pp. 120 to 126) dismissed the suit, thereby disagreeing with the City Recorder. A motion for a new trial was overruled, and a writ of error allowed to the Supreme Court of the State.

Rec. p. 18.

The bill of exceptions is found in the record from pages 19 to 126.

In the Supreme Court of Tennessee the Water Company also raised the Federal questions by its reply to the assignments of error filed on behalf of the City and also relied upon the other questions raised by it in the Circuit Court and there decided in its favor. Rec. pp. 138, 139.

The Supreme Court of Tennessee delivered its opinion (Rec. pp. 209, et seq.) by which it reversed the judgment of the Circuit

Court, holding in effect (1) that the ordinance in question had been legally passed and published; (2) that the power to regulate was a police power which the City could not contract away; (3) that the City had a continuing right to regulate charges for water notwithstanding the contracts and agreements of itself and its inhabitants with the Water Company.

Rec. pp. 216, 227, 228.

This conclusion with respect to the police power and right to regulate was reached by construing Section 2 of Chapter 104 of the Acts of 1877 to mean that by Section 1 of that Act no power was granted to the Water Company to enter into any contract or agreement either with the City or its inhabitants as to water rates which should interfere with the police power of the City or not be at all times subject to regulation by the City.

Rec. pp. 219, 227, 228.

It is proper to here call the attention of the Court to the fact that the Supreme Court of Tennessee (Rec. p. 227) erroneously ascribes the "power to regulate" to the charter of the City of Knoxville, when it is not even contended that such power is contained in said charter—the only claim being that it is conferred by Section 2 of Chapter 104 of the Acts of 1877.

The question as to whether the ordinance of March 30, 1901, was reasonable or unreasonable was not even considered by the Supreme Court of Tennessee.

Opinion, Rec. pp. 221–227.
Final Judgment, Rec. p. 230.

The Federal questions relied upon in this Court were expressly passed upon and decided both in the opinion and judgment of the Supreme Court of Tennessee adversely to the Water Company.

Rec. pp. 225, 229.

The Water Company sued out a writ of error from this Court, and has again raised the Federal questions by its assignments of error.

Rec. p. 230.

ASSIGNMENT OF ERRORS.

1. That said ordinance of March 30, 1901, is invalid and in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that plaintiff in error is deprived of its property and liberty without due process of law.

2. That said ordinance is also in contravention of Article I, Section 10, of the Constitution of the United States, in that it violates and impairs the obligations of the contracts existing between plaintiff in error and defendant in error and its inhabitants.

3. The Supreme Court of Tennessee erred in its holding that said ordinance was not in contravention of the Constitutional guaranties contained in Section 10 of Article I of the Constitution of the United States, and in Section 1 of the Fourteenth Amendment to said Constitution.

4. The Supreme Court of Tennessee erred in not holding that said ordinance and the powers sought to be exercised thereunder were in violation of the constitutional guaranties contained in said Constitution and said Amendment thereto.

BRIEF AND ARGUMENT.

From the foregoing statement of facts and errors assigned it will be observed that there are two Federal questions presented on the record for determination by this Court, viz.:

1. The question as to the invalidity of the ordinance of March 30, 1901, and as to whether its enforcement has deprived the Knoxville Water Company of its property and liberty without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution.

2. The question as to whether said ordinance, provided it shall be held to be valid, has impaired the obligations of the contracts entered into on the first day of July, 1882, and the 20th day of October, 1899, between said Water Company and the authorities of the City of Knoxville, and whether said ordinance impairs the obligations of the contract entered into between said Water Company and J. S. Gratz on the 17th day of September, 1896, in violation and contravention of Section 10 of Article I of the Constitution.

I.

AS TO DUE PROCESS OF LAW.

First.—Was the ordinance of March 30th, 1901, void by reason of the manner of its passage.

It could not become a valid ordinance under the provisions of the charter of the City of Knoxville without first having been read and passed at three several meetings of the Board of Mayor and Aldermen, that is, at three several regular meetings, or at three regular and valid "called" or "special" meetings, the Mayor having authority to call such special meetings. What are the facts relative to the passage of said ordinance? On the trial of this cause in the Circuit Court, upon the demand of the City the Cir-

cuit Judge made a special finding of facts which, with respect to the manner of passage of said ordinance, is as follows:

"In regard to the passage at special meetings, I find the following to be the facts:

"The regular meetings of the Board of Mayor and Aldermen of the city of Knoxville are on the first and third Fridays of each month, but under the charter of the city of Knoxville the Mayor has power to call special meetings of the Board of Aldermen. The ordinance upon which this suit is based was passed on its first reading on March 9th, at a special meeting of the council; on its second reading on March 15th at a regular meeting of the council; and on its third reading on Saturday, March 30th, at a special meeting of the council, and it was published on Sunday, March 31st, in the *Knoxville Journal and Tribune*, a daily newspaper published in the city of Knoxville; that newspapers in Knoxville, Tennessee, have been issuing regularly since 1866 Sunday editions or issues; that these Sunday editions are as large if not larger than any editions during week days.

"The said meeting of March 30, 1901, was in pursuance of a call of that date purporting to be signed by the Mayor of the city of Knoxville, S. G. Heiskell, but in fact the name of the Mayor in said call was signed by J. J. Atkins, chief of police of the city of Knoxville, who was instructed so to do by the Mayor, but the Mayor did not in fact see this call until it was read at the meeting of the council. The special meeting of March 9, 1901, was held in pursuance *to* a written call of same date signed by the Mayor, which, however, does not state the place of meeting. No notice of the meeting of March 9, 1901, was given to Aldermen Cleage, Trigg and Aiken, but Alderman Aiken attended the meeting, and no notice was given Alderman Cleage of the meeting of March 30, 1901; in regard to Alderman Trigg, it was not necessary for him to have notice, because he had tendered his resignation to John E. McMillan, Deputy Comptroller of the city of Knoxville, from four to six weeks prior to the time it is dated on March 15, 1901, when it was accepted by the council, and Alderman Kephart elected in his stead, and for some time previous to the meeting of March 9, 1901, said Trigg had abandoned and vacated his office by removing from the city of Knoxville to the city of Washington, in the District of Columbia, changing his residence and moving his family there, and was not entitled to notice. Alderman S. E. Cleage, who represented the 6th ward of the city of Knoxville,

was an active alderman in the discharge of his duties, and had neither abandoned his office nor resigned the same. At the time of his election as an alderman of the city of Knoxville, and on March 9, 1901, and March 30, 1901, he was in the employ of the Southern Railway Company, as law agent, with his headquarters at Asheville, in the State of North Carolina, and transacted his business principally in the States of North and South Carolina, and outside the limits of the State, his territory including about 500 miles of railroad. That his duties required him to go in person over his territory, investigating, report and adjusting claims for damages against said R. R. Co. That during the months of February, March and April, he was more than usually busy in the discharge of his duties, but retained his home in the 6th ward of the city of Knoxville and was active in the discharge of his duties as an alderman; that he attended nearly all of the regular meetings of the council and nearly all of the special meetings of which he had notice; that it was impracticable for him to have been present on March 30, 1901, at the special meeting on that date, but it was not impracticable to have given him notice of that meeting; that it was not impracticable to have given him notice of the special meeting on March 9, 1901, but it does not appear that it was impracticable for him to have attended that meeting; that there was no emergency for this ordinance to be considered at special meetings of March 9, 1901, and March 30, 1901. It was the duty of the municipal authorities to inform Alderman Cleage of the special meetings of March 9th and 30th, and as a public servant and official he had a right to have notice of these meetings, but notice was not given him, and therefore this ordinance of March 30, 1901 is invalid."

Rec. pp. 124, 125.

This finding of facts was not in any material respect changed by the findings and opinion of the Supreme Court.

Rec. pp. 211, 215.

The Supreme Court, however, does add a finding which was in strict accord with the facts, that Alderman Cleage, who was not present at either of the special meetings, was not only not notified, *but that no attempt was made to notify him* (Rec. p. 211), and that the special meetings which he failed to attend were called

(Rec. p. 215) during the evening and but a few hours before the special meetings were actually had.

What was the law in Tennessee with respect to special meetings of a municipal council at the date of the passage of the said ordinance of March 30, 1901? It was clear and well understood to be as set forth in the Opinion of the Supreme Court of Tennessee, as follows:

> "The result of the authorities upon the subject is that, as a general rule, every member of the municipal council is entitled to reasonable notice of special meetings, and that no action can be lawfully taken at such meetings unless such notice has been given, or unless the members not notified actually attend and participate in the business of the meeting. Land Co. *vs.* Jellico, 103 Tenn., 320."

This declaration of the Supreme Court of Tennessee is in strict accord with the rule upon the subject as expressed both in the text-books and the decisions of other Courts. But in this case the Supreme Court of Tennessee, upon the facts above set out, and in the face of the rule announced by it in Land Co. *vs.* Jellico, *supra*, only two years before, turns this point in favor of the validity of the ordinance by reaching the following conclusion, which expresses not a finding of fact but is purely an opinion of law upon facts practically undisputed:

> "We are of the opinion that when a member of the council . . . is continuously absent from the State, and when he is shown to have been absent from the State and beyond reach on the occasion and at the time of the call, as appears in this case, it is not *legally practicable* to give him notice of called meetings."
>
> Rec. p. 216.

When the actual and undisputed facts of this case are considered, we think it clear that this holding of the Court is not in accord with such facts, because (1) it was *legally practicable* to have given Cleage notice of the special meetings, if not personally, then by leaving such notice with his family, or usual place of residence, which was in the ward he represented in Knoxville. (Beach on

Pub. Corp., Sec. 265.) (2) Cleage was not continuously absent from the State in such manner as to neglect his official duties, for he attended the meetings of the Board regularly and promptly, and was present (Rec. pp. 107--111) at both of the regular meetings in March, 1901, notwithstanding the claim that his business as law agent in North Carolina was of such a character as to require all of his time and attention; (3) there was no emergency for the ordinance to be considered at the special meetings of March 9, and 30, 1901, upon a few hours' notice, and the action in calling the meetings under the circumstances was not reasonable on the part of the Mayor; there most assuredly was no emergency for the called meeting of March 9th; ample notice could and should have been given of this meeting; whether the fact that the Mayor allowed the last meeting at which the ordinance could be passed to elapse until March 30th, so that he had to call the special meeting on a few hours' notice in order to pass it and publish it before April 1st, raises a question as to the neglect of the Mayor rather than one of emergency, especially when the evidence shows that he could have given many days' notice of the special meetings just as easily as he gave a few hours' notice; Cleage could have been notified personally of the first special meeting during his attendance at the regular meeting on March 1st, and of the second special meeting when he attended the regular meeting of March 15th, but he was allowed to depart without notice. We submit that an emergency cannot be created by the neglect or action of the Mayor as in this case by which the rules and formalities of law may be set aside, but the emergency must really exist independently of neglect on the part of the official charged with the duty of calling a special meeting. When the surroundings of this case are considered there was no such emergency in existence as required the Mayor to call the special meetings at unreasonable times and upon unreasonable notice which did not (Rec. p. 38) state the place where said meeting was to be held on March 9, 1901. The general rule, as shown by Land Co. *vs.* Jellico, *supra,* is that reasonable notice

of both the time and place of special meetings of municipal bodies must be given to all the members of that body, and this rule is supported by reasons of public policy and is upheld by an almost unbroken line of authorities. The Supreme Court of Tennessee in this case recognized these authorities, but attempted to distinguish this case and take it out of the rule by an erroneous view or construction of certain undisputed facts as applied to what is called in the opinion (Rec. pp. 211--216) *legal practicability* of giving notice of special meetings.

In Dillon on Municipal Corporations (4th Ed.), Sec. 256, it is said: "If a meeting be a special one, the general rule is, unless modified by the charter or statute, that notice is necessary and must be personally served, if practicable, upon every member entitled to be present, so that each one may be afforded an opportunity to participate and vote."

And in Section 263 Mr. Dillon further says:

> "Nor is this merely an arbitrary rule, but founded upon the clearest dictates of reason and public policy. Any other rule would be fraught with danger to the rights of even a majority as when legally convened, the rule, in the absence of special restrictions being that a quorum can act, and the majority of the body being a quorum, it would but for this rule often be in the power of an unscrupulous minority to bind both the body and the corporation for which it acts for measures which neither approve. Thus with the body composed of twelve members a quorum of seven could act, and a majority of four, by withholding notice to five, might thus bind both the body and the corporation. Reason, therefore, and authority unite in saying that notice to all the members is necessary to a legal special session.

Again, he says:

> "Notice may be altogether dispensed with or its necessity waived by the presence and consent of every one of those entitled to it. It must be served personally upon every resident member or left at his house. If temporarily absent it may be left with his family or at his house or last place of abode; an order to serve all is not sufficient. All, if practicable, must be served, but if the party entitled to

notice has entirely quit the municipality and has no family or home within its limits, notice is not necessary."

And at Section 264 of the same authority, it is said:

"Such great importance is attached to notice that it can only be waived by universal consent; but if every member of a select body be present at a regular or stated meeting or at a special meeting, they may, if every one consents, but not otherwise, transact any business, ordinary or extraordinary, though no notice was given, or insufficient notice, but the unanimity of consent should clearly appear from their recorded declarations, acts or conduct. . . . If the charter imperatively requires a special notice, it cannot be waived even by the consent of all."

In 1 Beach on Public Corporations, Sec. 265, it is said:

"When a meeting is assembled for a special purpose, every member who has a right to vote is entitled to notice unless he has quit the municipality without retaining a home or leaving his family within its limits. . . . It must be personally served upon him, but in case of his temporary absence it may be left with his family or at his last place of abode."

Chief Justice Tilghman, in the case of Balt. Turnpike (5 Benny, 481), said: "That when several persons are authorized to do an act of a public nature they must all be notified or convened."

In Wilcox on Municipal Corporations we find it laid down that all corporate affairs must be transacted at an assembly convened upon due notice at a proper time and place.

In Paola *vs.* Commissioners, 16 Ks., 302, holding that the doings of a Board of County Commissioners at a special meeting were invalid because all members were not notified, Mr. Justice Brewer said:

"*And there is but one uniform rule running through the authorities.* In the case of Rex *vs.* Mayor, etc., of Shrewsberry, Rep. Temp. Hard., 151, it was said by the Court that 'when the acts are to be done by a selected board notice must be given of the time of special meeting.' It was a saying of Lord Kenyon's that special notice must be given to every member who has a right to vote."

In Angel & Ames on Corporations, Sections 492-494, it is laid down:

> "Usage and custom will not justify either the lack of notice or unreasonable notice to members of a municipal corporation. In the case of absence, notice must be left with the members of the family or his place of abode. It is no sufficient reason for omitting to summon a member that it was supposed that he was without the reach of summons, for to support the validity of corporate acts each member must be actually summoned."

Without making further quotations, it is respectfully submitted that the authorities support the rule contended for by plaintiff in error. The following additional authorities also support the rule contended for by plaintiff in error.

15 Am. & Eng. Ency. Law (1 Ed.), pp. 1035, 1080, 1081.
7 Am. & Eng. Ency. of Law (2 Ed.), p. 679, Note 2.
2 Cook on Corp., Secs. 594, 596.
Lord *vs.* Anoka, 36 Minn., 176.
Beaver Creek *vs.* Hastings, 56 Mich., 528.
Board of Supervisors *vs.* Horton, 75 Ia., 371.
People *vs.* Bachellor, 22 N. Y., 128.
Harding *vs.* Vandeater, 40 Cal., 77.
Stow *vs.* Wise, 7 Conn., 214.
Med. Society *vs.* Weatherly, 75 Ala., 248.
Band of Little Rock *vs.* McCarthy, 53 Ark., 473.
Wiggins *vs.* Free Will Bapt. Ch., 8 Mass., 301.

Second.—The ordinance of March 30, 1901, is unreasonable, oppressive, and deprives the Water Company of its property and liberty without due process of law.

The question of the reasonableness or unreasonableness of the ordinance of March 30th, 1901, was not considered by the Court (Rec. pp. 221, 227), and by the judgment of the Court (Rec. p. 230) the Water Company was remitted, without prejudice, to another remedy, "to litigate and show" whether said

rates are unreasonable; but standing upon the presumption in favor of the reasonableness of the rates then being enforced by the Water Company under the ordinance-contract of October 20th, 1899, it is not our purpose to go into a consideration of the rates prescribed by the ordinance in question, except as said ordinance lowers and alters rates agreed upon between the parties and operates upon conditions existing under and produced by the contracts between the parties.

By the contract of July 1, 1882 (Rec. p. 10), the City acquired the right to purchase the property of the Water Company. At this time, the City of Knoxville comprised only the first nine wards of the city as it now exists, and within these wards was situated the property of the Water Company. Afterward the Water Company acquired the North Knoxville water plant, and later on, and subsequent to the consolidation of the three municipalities, the Knoxville Water Company desired to acquire the plant and property of the Lonsdale-Beaumont Water Company, then being operated in the tenth ward of the City of Knoxville, formerly the town of West Knoxville, but before this consolidation could be accomplished either by merger or purchase, it was necessary, under the laws of Tennessee (Chap. 166 of the Acts of 1899) to obtain the consent of the city. Thereupon, on October 20, 1899, the City of Knoxville, by ordinance, gave its consent to the proposed consolidation, but in the same ordinance *extended its right of purchase* to cover all the property which the Water Company then owned or might thereafter acquire (sec. 4, Rec. p. 14), and also required the Water Company to bind itself to furnish water to the city and its inhabitants at a maximum rate not exceeding that fixed by the Lonsdale-Beaumont contract as applied to the inhabitants of the tenth ward of the City and as applied to the inhabitants of the remaining wards at a maximum rate not exceeding that fixed by the contract of July 1st, 1882, and the schedule of rates and charges then in force and operation by the Water Company, which was the schedule adopt-

ed by the Water Company on April 1st, 1895 (Rec. p. 14); and, by Section 6 of said ordinance, required the Water Company to file its written acceptance of said ordinance in so far as it altered or changed the contracts then existing between the City and the Water Company. We do not deem it necessary to point out or argue that the agreement as to the rate or price of water is one of the most material elements of any contract governing a supply of that commodity either to the city or its inhabitants. The income of the Water Company is necessarily dependent upon the revenues collected from its patrons. In the case at bar it is shown that the Water Company had agreed not only with the City as to the price or rate governing the supply to it, but had also agreed with the City as to the rate or price at which it would supply water to the inhabitants of the City. In addition to this the Water Company had entered into written agreements similar to that with Gratz appearing in the record with more than four thousand of its consumers (Rec. p. 86), to whom, as well as to the city, it was furnishing water under the schedule rates adopted and reaffirmed by the ordinance-contract of October 20th, 1899. Rec. pp. 85, 126.

If plaintiff is permitted to arbitrarily reduce these rates and charges, that is, the rates and charges provided for in said contract of October 20, 1899, which are presumed to be reasonable and just, it can and does arbitrarily reduce and impair the value of the Water Company's property, which it may be anxious to buy upon an appraisal under the contract of July 1st, 1882, and it can also arbitrarily, and by said ordinance of March 30th, 1901, does arbitrarily, undertake to reduce the amounts which it has agreed to pay the Water Company for its water, because it is shown in the proof (Rec. p. 85) and the special findings of the trial judge (Rec. p. 126) that the City does take water outside of the free uses and hydrant rentals, and has been paying therefor according to the schedule reaffirmed and adopted on

October 20th, 1899. Further, under its charter (Rec. p. 51, and Appendix No. 1) the Water Company is given not only the right to contract with the City and its inhabitants for a supply of water, but is expressly given the right *"to charge such prices for the same as may be agreed upon between said Water Company and said parties."* This right it has exercised not only with the City, but with more than four thousand of its consumers; and it is not improper here to point out that, notwithstanding the crusade against the Water Company inaugurated by the City authorities in July, 1900, by the passage of the ordinance of July 27, 1900, and continuing and resulting in the passage of the ordinance of March 30th, 1901, and although the Water Company has more than four thousand consumers, yet less than two per cent (Rec. p. 86) of said consumers have sought to take advantage of the ordinance in question and pay their water bills under protest.

This right to contract, and agree upon prices for water as an essential element of said right, is not in conflict with the city's claim of "power to regulate," but is property and *liberty* within the meaning of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United States. In Bank *vs.* Devine, 97 Tenn., 604, the Supreme Court of Tennessee, through its Chief Justice, upheld and sustained the right to contract as being one to be enjoyed to the fullest extent and perfection, and one of the objects of the Constitution was to preserve and protect this right.

Stratton Clamants *vs.* Morris Clamants, 89 Tenn., 497.

And so it has been held by this Court.

Williams *vs.* Fears, 179 U. S., 274.

By *"due process of law,"* which is synonymous with "the law of the land," is intended "that general law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial." By it is meant the natural and inherent prin-

ciples of justice, and it forbids that one man's property or right to property shall be taken for the benefit of another or for the State without compensation, and that no one shall be condemned in his person or property or be deprived of his liberty without in proper form being heard in his own defense.

Holden *vs.* Hardy, 169 U. S., 390, 391.
L. & N. R. R. Co. *vs.* Schmidt, 177 U. S., 230.
Brannon on the Fourteenth Amendment, 140 *et seq.*

Third.—By the ordinance of March 30, 1901, the City is made the judge of its own case.

Even though the City has the power to regulate rates, that power must be exercised in a reasonable and constitutional manner. Therefore, the question arises whether the Legislature of Tennessee could constitutionally delegate to the City the power to fix prices at which water should be sold to the authorities of the City, itself a consumer, and to its inhabitants, without some provision for judicial investigation of the reasonableness of the rates sought to be fixed by such authorities. In Cleveland Gas Light & Coke Company *vs.* the City of Cleveland, Mr. Justice Jackson said:

> "It would be a fearful proposition—monstrously absurd and outrageous—if the Legislature which undertook to confer upon a citizen of Cleveland the right to say at what price services should be rendered to him, or what he should pay for goods and articles furnished him. There is hardly any law in this land that would make the party being furnished the judge of the price that he should pay, or would say that his arbitrary decision should fix the rights of the parties. The City of Cleveland has undertaken to do that thing . . . The thing cannot be done, and ought not to be done."
>
> 71 Fed. Rep. 614.

In Agua Pura *vs.* Las Vegas (N. M.), the Court quoted approvingly the language of Justice Jackson and held that the action of the City authorities in attempting to fix rates and to

enforce their acceptance by a penal ordinance, without making any provision for judicial investigation of the reasonableness of the rates, was invalid and void, and in contravention of the Fourteenth Amendment to the Constitution of the United States.

90 L. R. A. 819

II.

DID THE ORDINANCE OF MARCH 30, IMPAIR THE OBLIGATION OF THE CONTRACT BETWEEN THE CITY OF KNOXVILLE AND THE KNOXVILLE WATER COMPANY OF JULY 1, 1882, AS EXTENDED AND REAFFIRMED BY THE ORDINANCE OF OCTOBER 20, 1899, BY CONSENT OF THE PARTIES THERETO?

We respectfully but confidently insist that this question must be answered in the affirmative, and relying on, without reviewing all of, the authorities cited in the brief on behalf of the Water Company before the Supreme Court of the State, and found in the printed record between pages 198 and 206, we submit the following:

First.—Was there power in the City to contract with the Water Company for supply of water to itself and its inhabitants?

The charter of the City, as hereinbefore shown, contained the following provision:

> "The Mayor and Aldermen of Knoxville shall have the following power: . . .
>
> "Sub-section 7. To provide the City with water by waterworks within or beyond the boundaries of the city, *or provide for supplying the city with water otherwise*, and to provide for the prevention and extinction of fires, and to organize and establish fire companies."

Under this authority it was fully competent for the City to contract with the Water Company for a supply of water for itself

and its inhabitants. We take it that this proposition will not be seriously disputed. Further, the exercise of such power, in contracting for waterworks to supply itself and its inhabitants with water, is not exercising its governmental or legislative functions, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a benefit for the City itself and its inhabitants.

Ill. Tr. & Sav. Bank *vs.* Arkansas City, 76 Fed. Rep., 271.
1 Dillon, Municipal Corps., Sec. 27.
Cincinnati *vs.* Cameron, 33 O. St., 336, 367.
Safety Insul. Wire Co. *vs.* Baltimore, 13 C. C. A., 375, 378.
Cunningham *vs.* City of Cleveland, 98 Fed. Rep., 657, 663.

Second.—Was there a contract between the City and the Water Company by which the rates or prices for water were agreed upon?

That there was such a contract cannot be questioned. In the paper itself it is so referred to. It is called by the City, "Articles of Agreement" (Rec. p. 5), and in a resolution passed by the City Council on February 8, 1888, it is referred to as a "*contract*" made . . . on the first day of July, 1882." (Rec. p. 47.) In the ordinance-contract of October 20, 1899, it was amended and referred to as the "contract existing between the City of Knoxville and the Knoxville Water Company dated July 1, 1882." (Rec. pp. 14, 15.) It is referred to in the opinion of the Supreme Court as an agreement and contract. (Rec. pp. 209, 219, 220.)

The subject-matter of the contract was within the powers of the City to make; the terms were explicitly set forth and the considerations definitely defined. Both the "agreement" of July

1, 1882, and the ordinance-contract of October 20, 1899, contain all the essential elements of a valid contract.

Vicksburg Waterworks Co. *vs.* Vicksburg, 185 U. S., 65-80.

Third.—Under its contracts with the City, the Water Company is exempt from further regulation of the rates fixed by said contracts.

Before approaching the consideration of said contracts, in order to ascertain their proper and legal construction under the charter of the Water Company, and the power to regulate rates vested in the City, it is not improper to state, as we understand it, the scope of the duty which devolves upon this Court in determining whether there was a contract, and if so, the construction to be given it. We assume that it will be insisted on behalf of the City that the construction placed upon the charter of the Water Company and the power conferred upon the City by the second section of the Act of 1877 by the Supreme Court of the State, will be binding upon this Court; but we do not understand that such is the rule of this Court. We understand that this Court will form an independent judgment as to both the existence of the contract and its proper construction, and that if in the "exercise of the independent judgment of this Court the existence or nature of the contract becomes 'balanced in doubt' such doubt will be resolved in favor of the construction given to the State statute by the court of last resort of the State," but because the State Court has construed the statute against the contract is not sufficient to raise a doubt against it or the construction contended for, and does not cause the question to be "balanced in doubt." "If the rule did so imply," to quote the language of Mr. Justice White, "it would follow that in every case where a right arose from a State statute and the court below held there was no contract the review of that question in this

court would be wholly nugatory, since the decision below would engender the doubt, and where doubt arose the decision of the State Court would have to be followed. The rule, then, to be applied when the matter is balanced in doubt, is this and nothing more, that if in using its independent judgment, as it is its duty to do, a serious doubt arises in the mind of the court, then the interpretation by the State Court, acting upon a serious doubt created by the exercise of independent judgment, will cause such doubt to preponderate in favor of a construction given by the State Court to its own statute."

Freeport Water Co. *vs.* Freeport City, 180 U. S., 610, 611.

Board of Liquidation *vs.* Louisiana, 179 U. S., 622, 638.

It is true that this quotation from the Freeport case is from the dissenting opinion of Mr. Justice White, but the rule as announced is in harmony with and based the opinion of the Court in Board of Liquidation *vs.* Louisiana, *supra.*

Further, we submit that to the extent that the judgment of the Supreme Court of Tennessee may have been based upon its opinion that the power to regulate rates is a police power, and that, therefore, the City could not be invested with power to bind itself by an irrevocable contract not to regulate rates, it is not in harmony with the repeated adjudications of this Court.

Los Angeles *vs.* Los Angeles Water Co., 177 U. S., 558.

Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 107.

N. O. Waterworks Co. *vs.* Rivers, 115 U. S., 674.

Now, what is the proper construction of Chapter 104 of the Act of 1877 from which the Water Company derives its powers and the city claims its right to regulate rates? We submit that the proper construction of said Act must be such as will give

effect to all its parts, and that the power to contract and the power to regulate are not repugnant to each other, and that Section 2 must be construed with respect to the power to regulate so as not to destroy and render absolutely nugatory the provisions of Section 1 of said Act granting to corporations organized thereunder the power and right to make contracts and agree upon prices relative to a supply for water and the rates and prices therefor.

Let us consider carefully the provisions of said Act. As hereinbefore shown, the charter of the Water Company was procured, after leave of the City of Knoxville had been obtained, on January 4, 1882, under the provisions of Section 1 of Chapter 104 of the Acts of 1877 (Rec. pp. 52, 54, Appendix No. 1). The second section of said Act of 1877, under which the City claims its power to regulate rates, reads as follows:

> "*Be it further enacted*, That such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village in which it is proposed to operate such waterworks, and such leave shall be certified by the Mayor or Recorder upon the application and registered with it. And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by such company."
>
> See Appendix No. 1.

The concluding portion of said Section 2, as set forth in the opinion of the Supreme Court of Tennessee (Rec. p. 219) is italicised, but the italics are by the Court, and do not appear in the Act itself.

By Section 1 of said Act and the charter of the Water Company, it is provided as follows:

> "*The Company shall have power*, and is hereby authorized to bring into said city a sufficient supply of water by means of pipes, etc., . . . and *to contract with said in-*

habitants and with the corporate authorities of said city or incorporated companies for the use of said water and charge such prices for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations respecting the use and waste of said water as the directors of the company may from time to time prescribe."

Rec. p. 52.

Further, it was provided:

"That nothing in said charter contained shall be construed to compel the inhabitants of said city to use the water so introduced by said company, or to prevent them from using water obtained in any other way."

Rec. pp. 52, 53.

Following the grant of the charter—namely, on July 1st, 1882—a contract was entered into between the City of Knoxville and the Knoxville Water Company, by which, in paragraph 7, the price of water is fixed, as follows:

"7. Said company will supply private consumers with water at a rate not to exceed five cents per 100 gallons. . . ."

Rec. p. 7.

On April 1, 1895, the Knoxville Water Company established a schedule of rates, rules and regulations in harmony with the provision of the contract above quoted, and in fact provided rates very much lower than the maximum rates stipulated in the contract.

Rec. pp. 87, 91.

On October 20, 1899, the Board of Mayor and Aldermen of the City of Knoxville gave its consent and approval by ordinance of said city to the consolidation of the Knoxville Water Company and the Lonsdale-Beaumont Water Company, under the name of the Knoxville Water Company.

Rec. p. 13.

This ordinance is important, inasmuch as it reaffirmed the water rate fixed by the 7th paragraph of the contract of July

1st, 1882, and adopted the schedule of rates and charges then in force and operation by the Water Company (which was the schedule promulgated April 1st, 1895), in the following language:

> "And provided further, that said consolidated Knoxville Water Company, succeeding, as aforesaid, to all the rights, privileges and franchises of both companies, shall also furnish to the people living in the remaining wards of the City of Knoxville, other than said tenth ward, or who may hereafter live in said remaining wards or such wards as may be hereafter added to the City of Knoxville, filtered and wholesome water, or water equal in quality to the filtered water now being furnished by the said Knoxville Water Company, at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the City of Knoxville, dated July 1st, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company."
>
> Rec. p. 14.

By paragraph 10 (Rec. p. 8) of the contract of July 1, 1882, the period of time and conditions upon which the company was to maintain the waterworks were fixed. It reads as follows:

> "10. Said company will maintain the waterworks herein stipulated to be built, in such condition as may be sufficient and necessary to enable it to comply with its undertakings herein set forth, for the period of thirty years from January 1st, 1883, unless the City shall become the owner of the same within that period, as may be done in the manner hereinafter stipulated."

The manner by which the City had the right to become the owner of the waterworks is fixed in paragraph 3 (Rec. p. 10) of the contract, as follows:

> "And it is hereby mutually agreed and understood that at the expiration of fifteen years from the time hereinbefore fixed for the completion of said waterworks, the city shall have the right, upon giving one year's notice of such purpose and intention, to purchase from said company the waterworks herein provided for, and all the property, rights,

> franchises and privileges thereto belonging, by negotiations, if thus the terms can be agreed upon, or if not, then at any time for a consideration to be fixed and determined by appraisers; and if not purchased at the end of fifteen years, the said works, property and franchises, rights, privileges, etc., may upon the same terms and conditions, and in the same way, be purchased by the city at the expiration of each and every year thereafter. . . ."

Then follows in detail the manner of giving notice and of choosing disinterested appraisers.

And the City of Knoxville, among other grants given, agreed, and bound itself as follows:

> "The City further obligates itself not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville, or the privilege of erecting upon the streets, lanes or alleys or other public grounds for the purpose of furnishing said city or the inhabitants thereof with water, for the full period of thirty years from the first day of August, 1883, provided the company comply with the requirements and obligations imposed and assumed by them under and by virtue of this agreement."
>
> Rec. p. 9.

Then the city (Rec. p. 11) bound the Water Company not to transfer, set over or assign the said contract so entered into for the construction of said waterworks to any company, corporation or individual, thus making it impossible for the company to sell or transfer said plant to any one except itself.

Hence at the time of the passage of the ordinance in question, the City was in a position to acquire, in the manner fixed by itself, the plant and all of the property of the Water Company, and the Water Company could not sell its property to any one except the City; therefore the stipulation in the contract granting to the Water Company an exclusive franchise during the term of the contract was, under the limitations upon the power of sale, really for the benefit of the City, in whose power the Water Company has been at all times, except as it may be protected by its contracts with the City.

These quotations have been made from the statute, the ordinances and the contracts because they form the basis for the presentation of the question of the proper construction of said contracts and the impairment of the obligations thereof by the ordinance of March 30th, 1901, and thereupon it is respectfully submitted that the following propositions are clearly established:

1. That the charter of the Water Company gave it plenary power to contract with the inhabitants or incorporated companies or the corporate authorities of the City of Knoxville, and to charge such prices for the use of the water as might be agreed upon between them.

2. That by the provisions of the statute (Acts of 1877, Chapter 104, Section 2) authority was conferred upon the City of Knoxville to regulate, by ordinance, the price of water to be supplied by the Water Company.

We respectfully insist that these powers conferred as clearly upon the Water Company as upon the City, are not destructive each of the other, and that it was not intended that the power to regulate should destroy the power and right to contract or *that it was to be exercised notwithstanding a contract expressly or impliedly renouncing that right.* We respectfully insist that the power to regulate was granted to the municipal authorities to be exercised either by a contract fixing terms, or if the Water Company refused to enter into a fair and reasonable contract with the City and its inhabitants, then and then only might the City by ordinance regulate and fix the price of water supplied by the Water Company to the City and its inhabitants. But it must be borne in mind that the Water Company did not refuse to enter into an agreement fixing the price of its water, and that thereupon on the first day of July, 1882, these parties, the company under its charter, the City under its power to regulate, entered into an agreement covering a period of thirty years, *fixing the prices of water.* After the lapse of nearly thirteen years—that is, in April, 1895—the Water Company established a sched-

ule of rates much lower than the maximum rates to which it was entitled under the contract of July 1st, 1882, and thereafter, namely: On October 20, 1899, the City, by ordinance of that date, accepted by the Water Company, reaffirmed and re-adopted (1) the rates provided in the Lonsdale-Beaumont contract as applied to the tenth ward of the City of Knoxville; (2) adopted as reasonable and just the schedule of rates then in force and operation by the Water Company, thus practically limiting, with the consent of the Water Company, the maximum charges to the schedule promulgated on April 1st, 1895.

Now, it will be further borne in mind that until July 27, 1900, and only about nine months after the solemn agreement between the parties on October 20th, 1899, the City authorities had never sought to arbitrarily alter or reduce the rates provided in its several agreements with the Water Company, and had never claimed the right to arbitrarily alter, change or regulate said rates notwithstanding its contracts and without the consent of the Water Company. No right or power to change, reduce or regulate the water rates fixed by the contract of July 1, 1882, or by the ordinance-contract of October 20th, 1899, was reserved by the terms or provisions of said contract; nor is any such right or power reserved or provided for in the charter of the Knoxville Water Company. The only source from which such right or power can be claimed is the provision of the statute of 1877, Ch. 104, Sec. 2, namely: "Such corporate authorites shall have power, by ordinance, to regulate the price of water supplied by such Company;" and therefore we respectfully but confidently submit that the corporate authorities by entering into their several contracts with the Water Company, exercised and exhausted their power to regulate rates for the use of water, and that, excepting with the consent of the Knoxville Water Company, the other party to said contracts, such rates cannot be reduced or changed in any manner whatever, but are valid and binding until the expiration of said contracts. Such action upon

the part of the corporate authorities in fixing and agreeing upon rates with the Water Company as late as October 20, 1899, is a recognition of the reasonableness and justness of these rates.

Further, the water supply as provided by these several contracts, was obtained only upon the faith of the Water Company in the binding and irrevocable character of those agreements, and especially of the rates therein provided. The rate is among the most material and important of the terms and conditions which were imposed by the City in consideration of its consent to the Water Company to do business and lay down its pipes within the corporate limits of said City, and afterwards to consolidate itself with the Lonsdale-Beaumont Company. It was a subject for grave consideration and conference between the parties, and when determined by mutual agreement, as was done on July 1st, 1882, and again on October 20th, 1899, the charge would naturally be regarded as fixed until another rate was adopted by like agreement. If such were not the case, what city could persuade parties to invest their capital in improvements which to be profitable must either be permanent or continue for such a length of time as to enable the investor to receive some return upon the amount invested by him. A different construction would be disastrous to the interests of the City.

> Walla Walla *vs.* Walla Walla Water Co., 172 U. S., 1, 20.

The principles announced in the case of Detroit *vs.* Detroit Citizens Railway Co., 184 U. S., 368, are applicable to this case, and unless there is a distinction made in the construction of the language of the respective statutes upon which the subject of establishing fares or rates, there is practically no difference in the cases. In the Detroit case, the statute provides that the rates of toll or fares shall be established by agreement between the Company and the corporate authorities, whereas in the case at bar the statute provides that the corporate authorities shall

have power, by ordinance, to regulate rates, and also invests the Water Company and the City authorities with power to agree upon rates, and the Water Company with power to furnish water at such prices as may be agreed upon; and the City authorities, acting under the statute, agreed and contracted with the Water Company to supply water for a period of thirty years, and as a material and essential part of said contract fixed and agreed upon rates for such supply of water, with the right reserved to buy said plant and property and a prohibition against the transfer thereof to any one excepting itself, in accordance with a reservation in said contract. The opinion in the Detroit case (*supra*), page 382, holds, upon the authority of a long line of decisions, that there can be no question as to the competency of a State Legislature, unless prohibited by constitutional provisions, to authorize a municipal corporation to contract for rates or fares and bind thereby any future common council from altering or in any way interfering with such contract, and that the contract once having been made, the power of the City over the subject, so far as altering the rate or fare, or other matters properly in and being a part of the contract, is suspended for the period of the running of the contract.

In City Railway Company *vs.* Citizens Street Railroad Co., 166 U. S., 557, cited in the above case, at page 387, Mr. Justice Peckham says:

> "Athough in that case there was no provision in the statute directing that the rates of fare should be established by agreement, yet nevertheless it was held that the language used amounted to an agreement upon the subject matter which could not be altered during its continuance by either party."

It is submitted that the Detroit case sustains the contention here—nanely, that when the Mayor and Aldermen of Knoxville, under the authority of the City authorizing them to agree upon the price of water or to regulate the price of water by ordinance,

not by ordinances from time to time, carried out their authority by entering into a contract with the Knoxville Water Company, to run for a period of thirty years, without reserving any right in the contract or in the ordinance upon the subject to alter or regulate such rate, that the contract is an absolute one between the parties for the period of time fixed, and not subject to change or alteration by one party without the consent of the other party. Mr. Justice Peckham says upon this point, and it applies to this case:

> "The fixing of rates is, as we have already said, among the most vital portions of the agreement between the parties contained in the ordinances. It cannot be supposed for one moment with regard to a right so fundamental in its nature that there was any intention to permit the common council in its discretion to thereafter make an alteration which might be fatal to the pecuniary success of the company," etc.
>
> Detroit *vs.* Detroit Railway Co., 184 U. S., 398.

Therefore, we confidently submit that this question is not "balanced in doubt," and that it is clearly established that the City has contracted away its power to regulate or by the exercise of that power has suspended it for the remainder of the contract period. When we consider the situation of the parties, the surrounding circumstances and the entire statute, we are compelled to this conclusion. The City was "the master of the situation." If the Water Company refused to enter into an agreement respecting reasonable prices for water, then, without its consent, the City might exercise this power to regulate, limited only by what would be unreasonable and oppressive; but if the City should exercise the power vested in it both to contract and regulate and enter into a contract and agreement with the Company for the use of water and agree upon prices for the use of such water, then it became bound by that provision of the Constitution of the United States which is written into every contract that it is sacred from alteration, change or impairment except with the consent of the other party.

III.

IN ANY EVENT, RATES ESTABLISHED BY THE CITY MUST BE SHOWN TO BE REASONABLE.

If it be held that, notwithstanding its contracts and those of its inhabitants, with the Water Company, that the City under Section 2 of Chapter 104 of the Acts of 1887, has a continuing power to regulate, then we insist that, upon the facts of this case, the burden is on the City *to show* that the *rates* which it has *previously agreed upon* and which it desires to regulate *have become unreasonable*, and that the rates which it seeks to ordain in lieu of the such rates are reasonable. In other words, the power to regulate can only operate either in the absence of a rate or upon an unreasonable rate, and if a reasonable rate be in force, then there is no reason why the City should exercise the power which is given it only to assure to the City and its inhabitants a reasonable charge or rate for water. We assume the answer to this proposition will be that when by ordinance the City has enacted a schedule of rates that the same will be presumed to be reasonable, but then it must be borne in mind that the rates sought to be enforced by the ordinance in question are identical with those set forth in the ordinance of July 27, 1900, passed only nine months after the ordinance-contract of October 20, 1899, became effective, and which, being assented to by the Water Company, became part of the contracts existing between the parties, and definitely fixed the rates to be thereafter charged by the Water Company for water; and if any presumption as to reasonableness arises from the mere enactment of an ordinance or the agreement of the parties, then certainly the rates ordained and agreed upon on October 20, 1899, must be presumed not only to have been reasonable, but upon well established principles, to continue reasonable until the contrary is shown.

The ordinance of October 20, 1899, however, assented to by the Water Company, may be looked upon as an Act to regulate, and the presumption of reasonableness, even according to the contention of the City, must attach to it. Will this Court say that nine months later, over the protest of the Water Company and without any showing that conditions have changed, the City may again reduce rates? Would not such action be an unwarranted, unreasonable and arbitrary exercise of a power given to be exercised in a reasonable way upon an unreasonable rate? And here we distinguish the case at bar from the Freeport case so much relied upon by the City in the Court below. In that case the Water Company admitted that the rates sought to be enforced by it "were unjust, unreasonable and oppressive," and that the rates sought to be enforced by the City of Freeport were "just and reasonable," therefore the City of Freeport was only seeking to exercise its power to regulate against an unreasonable and oppressive rate and establish in lieu thereof one which the Water Company admitted was just and reasonable.

> Freeport Water Company *vs.* Freeport City, 180 U. S., 590, 600.

And now, in conclusion, we ask the indulgence of the Court to permit us to quote from the opinion of Meyer *vs.* Brown, 65 Cal., 583, as found in Los Angeles Water Co. *vs.* City of Los Angeles, 103 Fed. Rep., 511, as follows:

> "It is occasionally well to recall the fact that there is no more reason to permit the municipal government to repudiate its solemn obligation, entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other."

Therefore, we confidently submit that the ordinance of March 30, 1903, is void because it impairs the obligations of the contracts between the Water Company and the City, in violation of

Article I, Section 10 of the Constitution of the United States, and because by it the Water Company is deprived of its property and liberty without due process of law, in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

CHARLES T. CATES, JR.,
Attorney for Plaintiff in Error.

HEBER J. MAY,
Of Counsel.

APPENDIX No. 1.

CHAPTER CIV.

AN ACT to amend an Act entitled "An Act to provide for the organization of corporations," approved March 23, 1875, and grant charter to water companies.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That the form of charter for a water company shall be as follows: "State of Tennessee. Charter of Incorporation. Be it known, that (here insert the names of five or more persons not under twenty-one years of age) are hereby constituted a body politic and corporate by the name and style of (here insert the name of the company). The general forms, etc., of said corporation are (here insert the general powers, etc., as directed in Section 5, Act March 23, 1875). The business of said company shall be to establish and construct waterworks in or near the town, city or village of (here insert the name), and it shall be the duty of said company to build, furnish and equip waterworks of sufficient capacity to furnish the corporate authorities and inhabitants of said town, city or village with water. To enable the company to establish such works they are hereby authorized and empowered to lay down pipes through the streets, lanes and alleys of said town, city or village, in such manner, however, as to produce the least possible inconvenience to the town, city or village, or its inhabitants, or to travelers, and to take up pavements and sidewalks; *Provided* they shall repair the same with the least possible delay.

Form of charter.

Waterworks.

Authority to lay pipes.

The company shall have power and are hereby authorized, to bring into the said town, city or village a sufficient supply of water by means of pipes or tanks, or in any other way, and to construct reservoirs for the reception thereof, and to supply with water the inhabitants of said town, city or village, and the environs thereof, and all who may be along the line of said companies' pipes, and of erecting hydrants or fire-plugs within the said town, city or village, and to contract with said inhabitants and with the corporate authorities of said town, city or village, or any incorporated companies, for the use of said water, and charge such price for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations respecting the use and waste of said water as the directors of said company may from time to time prescribe. The works and operations of said

Hydrants, etc.

Charges for water.

Works.

company shall be so constructed and managed that no annoyance shall accrue therefrom to the health and comfort of the inhabitants of said town, city or village, and nothing in this Act shall be so construed as to absolve the company, its officers or agents, from any legal proceedings to restrain or abate any nuisance arising from such waterworks or operations.

Penalty for injury to pipes, etc.

If any person or persons shall injure or destroy any portion of the water pipes or other property belonging to said company, or shall wilfully open a communication into the street or other water pipes, or let on water after it has been stopped by the company, such person or persons shall be liable for all damages sustained by such proceeding, and also a penalty not exceeding five hundred dollars, upon conviction before a Court having jurisdiction of the offense. If any person or persons shall take or use any of the water of said company for domestic or other purposes without having previously contracted for the same with the officers of said company, such person or persons shall forfeit and pay to the said company the sum of fifty dollars, to be recovered before any Justice of the Peace in the same manner as other debts are collected by law; *Provided*, that nothing herein contained shall be construed to compel the inhabitants of said town, city or village to use the water so introduced by said company, or to prevent them from using water obtained in any other way. If any person or persons shall wilfully corrupt or permit anything to run into or fall into any stream or reservoir from which the said company shall take water to be introduced into said town, city or village, which shall corrupt the same, or to render it unpalatable, unwholesome or unfit for domestic or manufacturing use, or for the supplying of stationary or locomotive engines, or shall bathe in any dam or reservoir, lead or enter any animal into the same, on being convicted thereof before any Justice of the Peace of the civil district in which said water is situated, shall pay a fine of not less than ten nor more than fifty dollars, one-half to the use of the informer, the other half to the use of said company, and shall moreover remain liable to said company for all damages.

Using water without license.

Penalties for injury to the water.

Leave of corporation.

SEC. 2. *Be it further enacted*, That such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village in which it is proposed to operate such waterworks, and such leave shall be certified by the Mayor or Recorder upon the application, and registered with it. And this Act is in no way to interfere with

or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company.

SEC. 3. *Be it further enacted*, That said Act approved March 23, 1875, be and the same is hereby further amended so that all corporations shall have obtained, or that may hereafter obtain charters under section 11 of said Act of 1875, shall in addition to the powers specified in said Act, also have power to raise, buy, sell and deal in agricultural products, operate flouring and other mills, and deal in merchandise. **Merchandising and milling powers.**

SEC. 4. *Be it further enacted*, That this Act take effect from and after its passage, the public welfare requiring it.

EDWIN T. TALIAFERRO,
Speaker of the House of Representatives.

HUGH N. McADOO,
Speaker of the Senate.

Approved March 27, 1877.

JAS. D. PORTER,
Governor.

APPENDIX No. 2.

CHAPTER 115.

AN ACT to amend an Act entitled an Act to provide for the organization of Corporations.

Water companies.

SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee*, That Chapter 142 of the Acts of 1875, entitled An Act to provide for the organization of corporations, approved March 23, 1875, be and the same is hereby amended so as to embrace the organization of water companies.

SEC. 2. *Be it further enacted*, That the form of charter for a water company shall be as follows:

Form of charter.

Be it known, that (here insert the names of five or more persons above the age of twenty-one years) are hereby constituted a body politic and corporate by the name and style of (here insert the name of the corporation), for the purpose of establishing and constructing waterworks (adjacent to, or in the city or town, as the case may be), and it shall be the duty of said company to build waterworks and machinery in or adjacent to said city or town and of sufficient capacity to supply said city and the inhabitants thereof with a plentiful supply of water, and for this purpose said company is hereby authorized and empowered and invested with the privilege to lay down pipes and to extend aqueducts and conductors through all or any of the streets, lanes, alleys of (said city or town), and to supply the inhabitants of said city or town with water by public works. And for the purpose of laying down such pipes, aqueducts and conductors, may take up the pavements or sidewalks upon such street after permission has been first obtained from the taxing district authorities in corporate towns or cities; *Provided*, that said pavements and sidewalks shall be taken up in such manner as to give the least inconvenience to the inhabitants of said city or town), and that the same shall be replaced with all convenient speed by, and at the expense of, said company in as substantial a manner as found before taken up.

SEC. 3. *Be it further enacted*, That the works and operations of such company shall be so constructed and managed as not to affect the health or comfort of (said city or town, as the case may be) prejudicially; and nothing in this Act shall be so construed as to absolve the said company or companies organized hereunder from legal proceedings to restrain or abate any nuisance arising from their operations.

SEC. 4. *Be it further enacted*, That if any person shall injure or destroy any portion of the fixtures or works, or property of the company or companies organized under this Act, such person or persons shall be liable to the company for all damages sustained in consequence of such act or injury.

SEC. 5. *Be it further enacted*, That said company or companies organized hereunder, are hereby empowered and authorized to condemn and take such lands as may be necessary for the establishment of their reservoir and works, and the right of way through all lands between their reservoir and the (said city or town, as the case may be) to lay their pipes, aqueducts or conductors, and keep the same in repair, is hereby granted said corporations or companies; *provided*, that such pipes and conductors shall be laid in such manner as to do as little injury to the property of private persons as possible; and, *provided further*, that said company shall make compensation to the owners of the real estate condemned or taken, or through which the pipes, conductors or aqueducts may be laid. If the owner and company cannot agree upon the amount of compensation which should be paid, the same shall be assessed in the manner provided by the Code of Tennessee, Sections 1325 to 1348.

SEC. 6. *Be it further enacted*, That said corporations or companies are hereby vested with all the powers and privileges and governed by the restrictions incorporated in Section 5 of said Act approved March 23, 1875 (here insert the power as contained in said Act and section), (being Act of 1875, Chapter 142).

Board of inspectors.

SEC. 7. *Be it further enacted*, That said company or corporation that may be organized under this Act, before they shall exercise any of the rights, powers and privileges herein granted, in order to secure a bountiful supply of good, pure and wholesome water, shall first apply to the authorities of the said city or town for the appointment of a board of inspectors to be composed of seven members, who are to be citizens and freeholders of said city or town, three of whom shall be chosen from the medical profession, if practicable. Said board so chosen, after being duly sworn shall make and file their report with the authorities of said town or city, stating therein from what source or sources said water supply shall be obtained; a report of the majority of the members composing said board shall be filed with said city or town authorities, and the same shall be conclusive as to the cause and quality of said water supply.

Report of inspectors.

SEC. 8. *Be it further enacted*, That said board shall, within ten days after their said appointment and qualification,

file their report (duly sworn to) with said town or city authorities.

SEC. 9. *Be it further enacted,* That this Act take effect from and after its passage, the public welfare requiring it.

Passed April 4, 1885.

C. R. BERRY,
Speaker of the Senate.

J. A. MANSON,
Speaker of the House of Representatives.

Approved April 9, 1885.

WM. B. BATE,
Governor.

OFFICE SUPREME COURT U.S.
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1908.

KNOXVILLE WATER COMPANY,
Petitioner,
vs.
MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE.
No. 212.

Petition for a Rehearing and Brief.

CHARLES T. CATES, JR.,
HENRY J. MAY,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States.

KNOXVILLE WATER COMPANY, *Plaintiff in Error,* *vs.* MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE, *Defendant in Error.*	October Term, 1902. No. 212.

Petition for a Rehearing.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court:

Now comes the plaintiff in error, Knoxville Water Company, and respectfully showing unto this Honorable Court that it is aggrieved by the opinion and judgment of this Court, filed and entered herein, petitions this Honorable Court for a rehearing of this cause, or for a modification of said opinion, for the following reasons:

First.

Because this Honorable Court failed to give any effect to, and wholly disregarded the provisions of, the ordinance-contract of October 20th, 1899, *expressed in the words of the City itself* (and not of the Water Company), as follows, to wit:

"And provided further, that said consolidated Knoxville Water Company, succeeding, as aforesaid, to all the rights, privileges, and franchises of both companies, shall also furnish to the people living in the remaining wards of the City of Knoxville, other than the said Tenth ward, or who may hereafter live in said remaining wards or such wards as may be hereafter added to the City of Knoxville, filtered and wholesome water, or water equal in quality to the filtered water now being furnished by the said Knoxville Water Company at a maximum *rate* not exceeding that fixed by the *contract* between the Knoxville Water Company and the City of Knoxville, dated July 1, 1882, *and the schedule of rates and charges now in force and operation by the Knoxville Water Company.*" (Record, p. 14.)

This was the language of the city expressed by its solemn ordinance as was the case in Detroit against Detroit Citizen's Street Railway Company, 184, U. S. 368.

Second.

Because this Honorable Court limited the rights of petitioner with respect to rates and charges of water to that provision of the contract of July 1st, 1882, as follows: "Said Company will supply private consumers with water at a rate not to exceed five cents per one hundred gallons," and held, in effect, that these are the only words relied upon by the Company; whereas by the ordinance of October 20th, 1899, made part of the contract between the parties by acceptance on the part of petitioner (Record, Pp. 14-15), the city, in effect, agreed that the Company might thereafter charge a maximum rate not in excess of the schedule then in

force and operation by the Company, and which, at that time, October 20th, 1899, was, with respect to meter rates, as follows:

Meter Rates.

0	to 50 M gals.	monthly,	25 c.	per M	gallons.
50	to 100 M "	"	20 c.	"	"
100	to 150 M "	"	15 c.	"	"
150	to 200 M "	"	12 c.	"	"
200	to 250 M "	"	10 c.	"	"
250	to 350 M "	"	9 c.	"	"
350	to 1,000,000 gals.	"	8 c.	"	"
Above 1,000,000 "		"	7 c.	"	"

Record p. 91.

The necessary effect of this ordinance of October 20th, 1899, was to make a new schedule of rates, the maximum of which was just fifty per cent. of the price named in the agreement of July 1st, 1882, and this provision with respect to the rates contained in said ordinance was most material to the city, *framed in its own language*, and made a consideration for the consent of the city to the consolidation of the Lonsdale-Beaumont Company and the Knoxville Water Company.

Third.

Because this Honorable Court held, in effect, that there was no contract between the city, and the Company; whereas not only is this agreement of July 1st, 1882 (Record Pp. 8 to 12), in form and substance a contract binding both parties with respect to the matters therein stated, but the ordinance of October 20th, 1899, framed in the words of the city itself, is also an agreement and contract with respect to rates.

Fourth.

Because this Honorable Court held that (quoting from the opinion) "the trouble at the bottom of the Company's case is that the supposed contract on which it is founded does not exist;" whereas the record shows conclusively the existence of a contract between the parties, that is, the agreement of July 1st, 1882, modified and amended by the ordinance-contract of October 20th, 1899. (Record Pp. 5 to 12; 13 to 15.)

This agreement of July 1st, 1882, has always been treated by the city, as well as the Company, as a contract, and as such, it was amended by mutual agreement on February 9th, 1888 (Record page 47), and again (Record Pp. 13, 14, 15), by the ordinance-contract of October 20th, 1899, and it was referred to by the Supreme Court of Tennessee in it opinion (Record Pp. 209, 219, 220) as an agreement and contract; therefore, it is respectfully submitted that this Court was in error in holding that a contract did not exist; and if, in that part of the opinion above quoted, it was intended to hold only that there was *no contract with respect to rates,* the opinion should be modified so that the limits of the Court's holding may be clearly defined; otherwise it must be apparent to the Honorable Court that petitioner will suffer irreparable injury with respect to the other vital matters involved in said contracts over which the city was not given, and it is not even claimed that it was given, any power of regulation whatsoever.

Therefore your petitioner prays:

1st. That an order may be made for a rehearing of the argument in this cause on a day to be appointed by the Court, at such time and upon such points as the Court may direct.

2d. If in the opinion of the Court your petitioner is not entitled to a rehearing of the argument on the merits, as prayed above, then it prays for a rehearing to the extent that the part of the opinion quoted in the fourth paragraph of this petition be so modified as to limit the holding "that the supposed contract * * * does not exist" to the question of rates, and to show that the remaining parts of the contracts existing between petitioner and defendant in error are not intended to be, and are not, affected by said opinion so quoted.

And so petitioner will ever pray.

KNOXVILLE WATER COMPANY.

By HEBER J. MAY, and
CHARLES T. CATES, JR.,
Its Attorneys.

We hereby certify that this petition for a rehearing is presented in good faith, and that we believe it is based on meritorious grounds.

HEBER J. MAY,
CHARLES T. CATES, JR.,
Attorneys for Petitioner.

Brief.

This petition for a rehearing is presented in the utmost good faith upon the ground that the broad language in the opinion will be destructive of the rights and interests of the Knoxville Water Company, if it shall be allowed to stand in its present form. In order to make plain our contention, we quote from the opinion as follows:

> "The trouble at the bottom of the Company's case is that the supposed contract on which it is founded does not exist. If such a contract had been intended it was far too important to be left to implication. In form the words are the words of the Company alone. They occur in the part of the contract which sets forth the Company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements," etc.

The above language will be construed to mean that no contract whatever has ever existed, nor now exists, between the Knoxville Water Company and the City of Knoxville, thereby giving to the controversy between the parties a new status, and one that has not been claimed by the city or contended for by it in the courts or elsewhere.

Is it a fact that the contract upon which the Company's case is founded does not exist? It is, according to its own terms, a memorandum of agreement made and entered into by and between the Knoxville Water Company, of said city, in the State of Tennessee, party of the first part, and the Board of Mayor and Alderman of the

City of Knoxville, Tennessee, party of the second part. The Company, in order to supply said city with water for fire protection and public sanitary and domestic purposes, "does hereby agree" to perform the various and important matters set forth in its part of the agreement (Rec. Pp. 5-8); and the city "in consideration of the premises on its part covenants and agrees" to perform the important matters and things set forth by it in paragraphs 1st to 5th (Rec. 8-10). The paragraphs above referred to constitute the agreement or contract between the parties, and contain the considerations and covenants from the one party to the other, upon which the same is founded. Afterwards some mutual understandings were added to the contract by way of addition or amendment, as contained in paragraphs 1st to 4th of subdivision III (Rec. 10-11), all of the provisions of which are intended simply to modify or limit the provisions of the contract as previously agreed upon and for the benefit of the city, paragraph 4th expressly stating that it is an amendment to article one of section one of the agreement. If these paragraphs have for their object the especial interests of the city, it is fair to presume they are formulated in the language of said city, and as they modify or amend the part of the contract which sets forth the Company's undertakings and practically embody or incorporate such part of the contract into the mutual agreements and obligations of the parties, it is a fair interpretation of the contract to say, in view of these facts, and in connection with the considerations and covenants of the city, that any cer-

tain words of the contract are the words of either of the parties alone. The words of the contract on behalf of the Company are substantially the words and requirements of its charter, and also of the statute authorizing the granting of the charter to the Company. (Rec. p. 51. Appendix No. 1 to brief.) The parties themselves have recognized the existence and effectiveness of the contract at all times and under all circumstances, the only controverted question between them being as to whether the fixing of the rate or price of water by said contract of July 1, 1882, and the ordinance of October 20, 1899, exhausted the power of the city to regulate such price, or whether the power of the city to further regulate such price without the consent of the Company existed under the law, notwithstanding the provisions of the contract. In other words, did the contract or the statute prevail in the matter of regulating the water rates? This was the only question between the parties to the suit. The only material change that was ever made in the water rate from that contained in the contract of July 1, 1882, at the instance of the city, was by the ordinance of October 20, 1899, and that was done with the consent of the Company. The contract of July 1, 1882, was at the same time by consent of the parties extended over new territory acquired or to be acquired by the city, thereby reafirming all of the agreements contained in said contract and solemnly acknowledging its existence.

We have here then a contract which has been treated as binding between the parties themselves, and which has been executed, or is in process of execution, by said parties,

as the case may be, from the date of its execution up to the present time, the only changes therein having been made by consent of such parties by the ordinance of October 20, 1899, unless the settlement of disputes as to hydrant rentals shall be regarded as an alteration, or amendment.

On February 9, 1888, the differences between the Company and the city concerning hydrant rentals, in regard to the contract of July 1, 1882, were settled, and the existence of the contract recognized by amendment. (Rec. 47–48).

On October 20, 1899, the existence of the contract of July 1, 1882, was recognized, and by section six of the ordinance, it is provided that, upon the acceptance, in writing, by the Knoxville Water Company of such ordinance (there was such acceptance) that, "in so far as it alters or changes said contract of September 17, 1892, and of July 1, 1882, signed by the president and secretary of said companies, in the office of the recorder of the City of Knoxville; and thereupon this ordinance shall be and become a part of each of said contracts, as fully as if the provisions of this ordinance were embraced in formal written contract, made and executed between the City of Knoxville and the said Lonsdale-Beaumont Water Company and the said Knoxville Water Company." (Rec. 13–16.)

The Supreme Court of Tennessee has, in its opinion, recognized the existence of the contract between the city and the company, in the following language:

"The water company has a valuable plant at Knoxville, which it has erected and operated under contracts and ordinances made by the City of Knoxville, and it has valuable franchises in the furnish- of water to the city and people."

* * * * *

"The defendant company continued to charge the rates provided in a contract and previous ordinance of October 20, 1899," etc." (Rec. 209.)

* * * * *

"On the first of July, 1882, an agreement was entered into between the city and the water company in regard to the erection by the latter of waterworks, and the supplying for a period of thirty years, the city and its inhabitants with water," etc.

* * * * *

The contract provides, etc., etc, (Rec. 219),

* * * * *

On October 20, 1899, the city passed an ordinance authorizing the Knoxville Water Company to "supply to the inhabitants of the balance of the City of Knoxville" (excepting North and West Knoxville), "water at a maximum rate, not exceeding that fixed by the contract of July 1, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company." (Rec. 220.)

The Tennessee Legislature passed an act, which was approved February 2, 1903, in which the contract of July 1, 1882, and the ordinance of October 20, 1899, are so completely recognized as existing contracts between the city and the company, that we have printed the act as a part of our argument and marked it Exhibit No. 1.

The Knoxville Water Company and the City of Knoxville were competent parties to enter into the contracts of July 1, 1882, and October 20, 1899, the former under the Act of April 9, 1885, c. 115 (Appendix No. 2 to brief) and its charter (Rec. 51) granted as provided for in the Act of March 27, 1877, c. 104, and by leave of said city (Appendix No. 1 to brief), and the latter under the authority conferred upon it by the Act of April 9, 1885, c. 115, (Appendix No. 2 to brief) which is amendatory of an Act of March 23, 1875, c. 142.

Mr. Justice Shiras said in Vicksburg Water-works Co. *vs.* Vicksburg, 185 U. S. 65, 80, as follows:

> "It can not be seriously contended that under the Act of March 18, 1886, authorizing the city to provide for the erection and maintenance of a system of water-works, and to contract with a party or parties to build and operate water-works, and under the ordinance of the city of November 18, 1896, providing for a supply of water to the city and its inhabitants by contracting with Samuel R. Bullock & Company, their associates, successors and assigns, and the acceptance of said ordinance by Samuel R. Bullock & Company, no contract was entered into. The subject-matter of the contract was within the powers of the city to make; the terms were explicitly set forth in the ordinance; the works erected were approved by the city, and the respective obligations created by the contract were duly complied with without question or complaint, for a period of fourteen years."

The city of Knoxville acquiesced in the contracts of July 1, 1882, and October 20, 1899, for about eighteen years and nine months, subject to such alterations therein as were made by mutual consent.

And it is hereby submitted that, since the opinion in this case has been handed down, legislation has been procured in the General Assembly of Tennessee, by which the city of Knoxville is authorized to own and operate a system of water-works, the provisions of the act effectively evading all of the obligations and agreements of the parties, mutual and otherwise, contained in the contract of July 1, 1882, and as re-enacted by mutual agreement in the ordinance of October 20, 1899, in regard to the purchase by said city from said company of the water-works at a price to be agreed upon or to be fixed by disinterested appraisers. The act was passed March 31, 1903, and approved April 3, 1903, and is marked Exhibit No. 2 as a part of this argument.

We submit, with confidence, that a contract does exist between the city of Knoxville and the Knoxville Water Company, whether it may or may not be subject to the right of the city to regulate the price or rates of water to its inhabitants or private consumers.

Respectfully submitted,

CHARLES T. CATES, JR.
HEBER J. MAY,
Attorneys for Petitioner.

Exhibit No. 1.

CHAPTER 12.

House Bill No. 28.

AN ACT to authorize the city of Knoxville to issue bonds to purchase and acquire the plant and property of the Knoxville Water Company, build extensions thereto and maintain and operate the same.

Whereas, Under and by virtue of a certain contract dated July 1, 1882, executed by the authorities of the city of Knoxville (a municipal corporation) and the Knoxville Water Company (a corporation organized under Chapter 103 of the Acts of 1877) and an ordinance of said city passed October 20, 1899, and accepted by said Knoxville Water Company on the same day, said city of Knoxville has an option and the right to purchase all the property now owned or hereafter acquired up to the date of the purchase of said Knoxville Water Company, at a valuation to be fixed by an appraisement, if not agreed to, as provided in said contract of July 1, 1882, and carried forward and extended in the ordinance of October 20, 1899; and,

Whereas, The city of Knoxville desires to take up said option and purchase the plant and property of said Knoxville Water Company to the end that the same may be owned, operated and maintained by said city for the benefit of the people thereof.

Now, therefore, in order that said city may be enabled to purchase and acquire the plant and property of said Knoxville Water Company and build additions thereto that may be deemed necessary.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That the city of Knoxville, the corporate name of which is the Mayor and Aldermen of the city of Knoxville, be and hereby is, authorized to make the purchase of the plant and property of said Knoxville Water Company, and to make necessary extensions thereto, and for that purpose the said city of Knoxville is hereby authorized to issue bonds in such amount, number and denomination, and to run such

length of time as may be determined by the Mayor and Aldermen of said city, at a rate of interest not exceeding 4 per cent., payable semi-annually, for such time as said Mayor and Aldrmen of said city may determine, to enable it to acquire the plant and property of the Knoxville Water Company in accordance with the terms and provisions of the aforesaid contract of July 1, 1882, and the aforesaid ordinance contract of October 20, 1899.

Sec. 2. That authority is hereby conferred upon said corporate authorities of the city of Knoxville to issue such an amount of bonds as may be necessary to purchase and acquire the said plant and property of the said Knoxville Water Company upon the agreed valuation between the contracting parties, or in default of same, upon a valuation to be ascertained and fixed by appraisers in accordance with the provisions of the aforesaid contract of July 1, 1882, and the ordinance of October 20, 1899, between said city and said Water Company.

Sec. 3. That in addition to the bonds necessary to enable said city to acquire the plant and property of said Water Company, said city is hereby authorized to issue additional bonds in an amount not exceeding 10 per cent. of the amount of bonds necessary to purchase said plant and property of said Water Company to be used in making additions to said plant, including acquisition of such real estate or other property necessary in making such additions.

Sec. 4. The bonds shall be payble in gold coin of the United States, of standard weight and fineness, provided, however, that the city may either issue its own bonds in exchange for outstanding bonds of the Knoxville Water Company as part of the purchase price of said plant and property, or the said city may assume, as part of the purchase price, the bonded indebtedness now upon the plant and property of the Knoxville Water Company, or any part thereof, in lieu of the issuance and sale of a proportionate amount of its own bonds under the power herein granted.

Sec. 5. Before notice shall be given or an appraisal had in pursuance to the contract of July 1, 1882, and the ordinance of October 20, 1899, or issuance of bonds, an election shall first be called throughout the city of

Knoxville under the general laws governing municipal elections in Knox County, and if two-thirds of the qualified voters of said city voting in said election shall vote in favor of the purchase of the property and plant of the Knoxville Water Company and the issuance of the bonds for the purposes of this Act, or exercise of other powers herein given, then the Mayor and Aldermen of the city of Knoxville shall forthwith give notice of the acceptance by the city of the option to purchase said plant, whereupon, unless the valuation of said plant is agreed upon by the contracting parties, an appraisal shall be had of all the property of the Knoxville Water Company, as provided for in the contract of July 1, 1882, and in the ordinance of October 20, 1899, after which bonds sufficient shall be issued as may be necessary under this Act for the purchase of said property and plant. The said bonds to be under the management and control of the Commissioners to be hereinafter appointed, and to be sold, if sale is necessary, at not less than par; provided, however, that the city may exercise the power herein given to assume the bonds of the Knoxville Water Company to be credited at par upon the appraisal value of said property

Sec. 6. That the Commissioners of Election shall furnish according to the laws now existing and regulating elections in this State, tickets to be used in said election and upon such tickets shall be printed, first, "Bonds;" second, immediately below, "No Bonds," and persons voting for the issuance of bonds and for the purchase of the property and plant of the Knoxville Water Company and for the extension of same and the other provisions of this Act, shall mark their tickets with a cross opposite the word Bonds, and those voting against the same shall in like manner mark their tickets opposite the words No Bonds.

Sec. 7. That the Mayor and Aldermen of the city of Knoxville shall have the power of eminent domain to take and appropriate in making extensions to said plant the grounds and other real property in the same manner as are now provided for condemnation in laying out streets, etc., in sub-Section 30 of Section 18 of the charter of the city of Knoxville.

Sec. 8. That for the purpose of controlling, managing and operating said water plant and for the disposal of the bonds or money realized therefrom, as provided in this Act in the event of a favorable election for the issuance of bonds, as hereinbefore provided, there is created a Water-works Commission for said city, which shall be composed of three members, all to be reputable citizens and tax-payers of the city without any other official connection with the city, and without any connection whatever with the Water Company. Said Commissioners shall be elected by the City Council at its next regular session after it has been determined that the city has voted in favor of the issuance of bonds for the purchase of said plant, etc., by the majority herein designated.

The said Commissioners so elected shall hold for a period of one, two and three years respectively from the date of their election and qualification, and until their successors are elected and qualified.

The Mayor and Aldermen of the city of Knoxville shall have the power to fill all vacancies in said Water-works Commission at any regular session of said Board after which vacancy occurs.

Said Commissioners shall take an oath of office to faithfully perform their duties before the City Recorder, who shall file in his office said oaths and preserve the same, and they shall likewise give bond in such sums as the Mayor and Aldermen of the city of Knoxville may prescribe, conditioned for the faithful discharge of their duties, which bond shall likewise be filed and preserved in the office of the Recorder of said city.

Said Commissioners are forbidden to have or take any interest, direct or indirect, in any contract or transactions relative to the purchase, extension or operation of said plant.

The compensation to be paid said Commissioners shall be determined by the Mayor and Aldermen of the city of Knoxville in such sum as said authorities may deem adequate, the same to be fixed before said Commissioners are elected. Said Commissioners will elect a Chairman and Secretary, and also such clerks as may be necessary for the work to be done, and also a Treasurer of the Commission, whose salary shall be fixed by the Mayor and Aldermen of the city of Knoxville.

The said Commission shall require of such clerks and Treasurer an adequate bond for the faithful discharge of their duties, which bond shall be approved by the Board of Mayor and Aldermen, and shall be filed and preserved in the Recorder's Office of said city.

The powers and duties of said Commissioners shall be full and ample to make all contracts for the extension of said plant or the operation and maintenance of the same, but all contracts involving an expenditure of more than five thousand ($5,000) dollars, shall be reported to the City Council, and approved by it before the same shall be final. The said Commissioners shall also have the power, subject to the foregoing limitations, of making all needed repairs deemed by them necessary to the proper operation and maintenance of said plant. Upon due notice any Commissioner guilty of misconduct or misfeasance in office shall be removed by the Mayor and Alderman of the city of Knoxville.

Sec. 9. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it.

Passed January 29, 1903.

L. D. TYSON,
Speaker of the House of Representatives.

ED. T. SEAY,
Speaker of the Senate.

Approved February 2, 1903.

JAMES B. FRAZIER,
Governor.

STATE OF TENNESSEE—OFFICE OF SECRETARY OF STATE.

The foregoing is a full, true and correct copy of House Bill No. 28, Acts of the General Assembly, State of Tennessee, 1903, to authorize the city of Knoxville to issue bonds to purchase or acquire plant of the Knoxville Water Co.

Witness my hand and the Great Seal of the State of Tennessee, April 8th, 1903.

[SEAL.]

JNO. W. MORTON,
Sec'y of State.

Exhibit No. 2.

CHAPTER 153.

Senate Bill No. 257.

AN ACT to authorize the City of Knoxville to own and operate a system of water-works, and to issue bonds for that purpose, and to amend House Bill No. 28, being an Act entitled "An act to authorize the City of Knoxville to issue bonds to purchase and acquire the plant and property of the Knoxville Water Company, build extensions thereto, and maintain and operate the same." Passed January 29, 1903, and approved February 2, 1903, so as to read as follows:

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be lawful for the Mayor and Aldermen of the City of Knoxville to acquire, own and operate a system of water-works for said city and adjacent territory, either by purchase or construction, and for that purpose it is authorized to issue its interest-bearing coupon bonds to an amount not exceeding $750,000 in the manner and under the restrictions hereinafter provided.

Sec. 2. Be it further enacted, That said bonds shall be issued under rules, regulations, and restrictions to be provided by ordinance, by the Mayor and Aldermen of said city, which bonds shall be in the denomination of $1,000 each, and shall bear a rate of interest to be fixed by said ordinance, not exceeding four per cent. per annum, and shall run for a period of not longer than forty years, the interest on the same to be payable semi-annually on the first of January and July, respectively, said interest and principal to be paid in gold coin of the present standard and fineness, and which said bonds shall be provided with coupons for each semi-annual interest payment, and said bonds shall be known as the "Water-works bonds" of the City of Knoxville, and shall not be sold for less than par. No commission whatever shall be allowed for the sale of said bonds.

Sec. 3. Be it further enacted, That the proceeds of said bonds shall be paid into the city treasury and be there kept and preserved as a separate fund, to be used exclusively in the purchase or construction of a system

of water-works for said city and adjacent territory, and in making such alterations, extensions, additions and improvements as may be necessary, and in maintaining the same. Said bonds, and all coupons attached to said bonds, shall at maturity be, and remain until fully paid, a lien on said water-works property, appurtenances, rights, franchises and privileges, acquired by the corporate authorities of said municipality. Said lien shall include and extend to all improvements, extensions and additions which the corporate authorities of said municipality may make, and shall be in addition to the corporate liability for the payment of said bonds. Said bonds and coupons attached thereto shall be exempt from municipal taxation.

Sec. 4. Be it further enacted, That there is hereby created for said city of Knoxville a water-works commission, to be composed of five citizens and freeholders of said city, who shall be elected by the City Council of said city, as herein provided. One member shall be elected for one year, one for two years, one for three years, one for four years, and a fifth for five years, who shall hold their office for the time for which they shall be elected and until their successors shall be elected and qualified; which successors shall each be elected at the conclusion of the several terms aforesaid for the term of five years thereafter; Provided, that election to fill vacancies in said commission shall only be for the unexpired term in which the vacancy occurs. Said commissioners shall not be related to the Mayor or any member of the City Council, or any department official of said city within the fourth degree, either by affinity or consanguinity. The first Board of Commissioners shall be elected not earlier than sixty days after the passage of this act, which election and all subsequent elections, including elections to fill vacancies, shall be upon thirty days' public notice and at a regular meeting of said City Council.

Sec. 5. Be it further enacted, That before entering upon their duties said commissioners shall each file with the City Recorder a bond with solvent surities in the penalty of one thousand dollars, payable to the State of Tennessee, for the use of the City of Knoxville, condi-

tioned that said commissioner shall honestly and faithfully perform all the duties devolving upon him as such commissioner, which bond shall be approved by the Mayor and alderman of said city, and said commissioner shall, before entering upon their duties, take and subscribe to the following oath.

"I, ———, do solemnly swear that, as a member of the water-works commission of the City of Knoxville, I will honestly and faithfully perform all the duties devolving upon me as such commissioner, and that I am not related to any of the parties forbidden by law within the prohibited degree, and that I am not, and will not become during my term of office, interested in any contracts relating to the construction or operation of said water-works, as prohibited by law. So help me God."

Sec. 6. Be it further enacted, That said commissioners are hereby prohibited from having any interest, direct or indirect, in any contract in anywise relating to the construction, purchase and operation of said water-works, and are also prohibited from awarding contracts for the construction or operation, or for any materials for use in the construction, extension and operation of said water plant to any person or persons related to any of the members of said commission within the fourth degree, either by affinity or consanguinity, or to any member of the City Council, or to any department official, of said city, or in which any such person, member or department official, or any assistant, clerk or deputy under them, has any direct or indirect interest.

Sec. 7. Be it further enacted, That the entire work of supervision of the purchase or construction and operation and maintenance of said system of water-works shall be vested in said Board of Commissioners as above provided within the the limitations hereinafter provided.

Sec. 8. Be it further enacted, That said commissioners are authorized and directed to obtain from the Knoxville Water Company a written proposition for the sale of its plant, franchises, etc., to the city of Knoxville, giving the price and terms of payment, together with the opinion of competent, disinterested experts as to the cost and present value of said plant; said commission is also authorized and empowered to secure plans, speci-

fications and estimates of the cost of the construction of a new system of water-works, and to report all matters called for in this section to said City Council for its consideration, and to accompany said report with its recommendations in the premises, which recommendations shall be accompanied with all facts, testimony and opinions upon which the same are based. Provided, that said commission shall not close any contract for the purchase or construction of water-works until it has been duly authorized to do so by said City Council, after the proposition shall have been ratified by a vote of the people as herein provided; and provided, further, said commission shall not incur any expense in any of said matters until authorized to do so by said City Council, and until there has been appropriated out of the city treasury and placed to the credit, and at the disposal of said commission, a sufficient amount of money to cover such expense.

Sec. 9. Be it further enacted, That said commission shall organize by electing one of their number as chairman, and by electing a secretary and treasurer, who need not be a member of said Board of Commissioners, but who, before entering upon his duties, shall execute bond in a penalty to be fixed by the Board of Mayor and Aldermen, and with good and sufficient surities to be likewise approved by said board. Said water-works commissioners shall have regular meetings, and may have special meetings under rules and regulations adopted by themselves. They shall keep a true and faithful record of all their actions and proceedings, and of the water-works plants purchased or constructed by them, and of all extensions, alterations, and improvements made by them. A copy of said record on any subject, certified by said chairman and secretary, shall be evidence in the courts of this State. They shall be authorized to make contracts, employ clerks, engineers, firemen, superintendents' inspectors, water-meter readers, plumbers, laborers, and other persons, and purchase materials such as may be necessary in the construction or operation of said water-works plant. They shall fix the compensation of all employees, except that of the secretary and treasurer, whose salary or compensation shall be fixed by the

Board of Mayor and Aldermen. Said secretary and treasurer, when elected, shall not be related to any member of said water-works commission, or to any department official of said city within the fourth degree. They are authorized to make and enforce reasonable rules and regulations and to fix water rates, tolls, or the price for the use of water, and they may for said purpose, enter upon premises where water is used or desired for purposes of inspection, repairs, or other work in introducing or regulating the use of water. They shall have full power to collect and enforce collections of all moneys due for the use of water or arising out of the operation of said plant. They shall also have power to grant the use of water free of charge to persons who are objects of charity, and to charitable institutions. But the rules and regulations and water rates made by said commissioners shall be subject to ratification by ordinance by the Board of Mayor and Aldermen.

Sec. 10. Be it further enacted, That no contract made by said water-works commissioners in the construction, alteration or extension of said water-works, involving more than one thousand dollars, shall be binding upon the city, until submitted to the Board of Mayor and Aldermen and approved by them.

Sec. 11. Be it further enacted, That said water-works commissioners shall submit to the Board of Mayor and Aldermen at their last regular meeting in January of each year, a full detailed report of the work, income and expenditures for the preceding year, showing sources of income, items of expense, names of all salaried employees, improvements, extensions, and alterations made and such other matters as they may deem material, and as the Board of Mayor and Aldermen may call for. And their report and books shall be subject to examination and correction by the Board of Mayor and Aldermen. Said report shall also contain an estimate of the costs, expenses, improvements, extensions, and alterations necessary for the succeeding year.

Sec. 12. Be it further enacted, That the Board of Mayor and Aldermen of the City of Knoxville shall have, and are hereby given and granted, power and authority to determine by ordinance whether or not the

members of the water-works commission shall be compensated for services rendered, or shall render same without compensation; and if compensation is determined to be allowed them, then the amount of such compensation, and manner and time of its payment, shall be fixed by ordinance.

Sec. 13. Be it further enacted, That in the event it shall be determined to purchase or construct, equip and maintain a system of water-works by the city, then, for the purpose of securing sites for pumping stations and other necessary purposes, including the laying of mains and water pipes, and sites for reservoirs and filtering galleries, extensions, improvements, and alterations, the city shall have and is given the right of condemnation of grounds within and without its corporate limits, as already given in sub-section 30 of Section 18 of its charter, as well as by proper proceeding in the Circuit Court for Knox County, as provided by law.

Sec. 14. Be it further enacted, That any member of said Board of Water-works Commissioners shall be subject to removal by the Board of Mayor and Aldermen for incompetency or official misconduct, upon specific charges in writing, and after due notice to the members against whom charges are made, and after trial, or opportunity of trial, before the Board of Mayor and Aldermen. But two-thirds of said Board of Mayor and Aldermen shall vote for said removal before the same can be made.

Sec. 15. Be it further enacted, That after said Commissioners shall have made their report to the City Council, as provided in Section 8 of this act, said City Council shall call an election to be held in the said City of Knoxville, by the regularly constituted authorities, after thirty (30) days' advertisement in two city papers, at which all persons legally qualified to vote for Mayor and Aldermen of said city may vote, for the purpose of ascertaining the will of the people upon the following questions:

First: Whether or not the city shall be authorized to issue bonds, as provided in Section 1 of this act, and

Second: To determine whether the city shall purchase the plant of the Knoxville Water Company, or construct

a new water system. The election commissioners shall cause to be prepared ballots to be used and voted at said election, on which there will be printed the following:

"Vote for one."
"For Water-works Bonds."
"Against Water-works Bonds."
"Vote for one."
"For Construction of Water-works."
"For Purchase of Water-works."

At said election those who favor the issuance of bonds shall place a cross (X) mark opposite the words "For Water-works Bonds," and those who oppose the issuance of bonds shall place a cross (X) mark opposite the words "Against Water-works Bonds," and those who favor the construction of water-works shall place a cross (X) mark opposite the words "For Construction of Water-works," and those favoring the purchase of the Knoxville Water Company's plant shall place a cross (X) mark opposite the words "For Purchase of Water-works."

Provided, that if said Water-works Commissioners are unable to obtain from the Knoxville Water Company a written proposition for the sale of its plant, franchise, etc., to the City of Knoxville, giving the price and terms of payment, "For Water-works Bonds," Against "Water-works Bonds," shall be issued for the construction of water-works and the tickets shall contain only the words "Vote for One," "For Water-works Bonds," "Against Water-works Bonds," and those who favor the the construction of water-works by the city shall place a cross (X) mark opposite the words "For Water-works Bonds," and those who oppose the construction of water-works by the city, place a cross (X) opposite the words "Against Water-works Bonds." Said election shall be held under existing laws and the returns shall be duly certified to the Board of Mayor and Aldermen of said city; provided, there shall also be returned to said Board of Mayor and Aldermen all the ballots voted at said election, together with one set of poll books and one set of tally sheets. The remaing poll books and tally sheets shall be filed in the office of said commissioner of election, there to be held subject to the inspection of any

citizen of said city. Provided, that the election authorized by this act may be called and held by the election commissioners of the county under the general election laws and held at any time within two years after the passage of this act.

Provided further, that after one election has been heldunder this act, one or more subsequent elections may be held under this act, but no such election shall be held until the expiration of at least twenty-four months after a previous election.

Sec. 16. Be it further enacted, That it shall be the duty of said City Council, when it shall be convinced that two-thirds of all those voting on the question of the issuance of bonds have voted in favor thereof, to declare the result by ordinance, and in that event and no other, to cause said bonds to be issued as provided herein, and cause the same to be converted into cash under such rules and restrictions as it shall deem necessary to provide by ordinance. Provided, that said bonds shall not be issued until after a contract for the construction or purchase of said water-works shall have been lawfully made and concluded.

Sec. 17. Be it further enacted, That said City Council shall also canvass and by ordinance declare the result of said election on the question of purchase or construction of a system of water-works, and shall cause to be carried into effect the will of the people as expressed at said election. Provided, that if the said Knoxville Water Company submit a written proposition as shown in Section 8 of this act, a majority of those voting on said proposition for purchase or for construction in favor of either proposition, shall be sufficient and shall decide the question.

Sec. 18. Be it further enacted, That the net annual income and revenue derived from the operation of the water-works system, after payment of operating expenses, extensions and improvements, or as much thereof as shall be necessary for that purpose, shall be set apart and applied, first, to the payments of the interest coupons of the said water-works bonds as such interest coupons shall mature.

Sec. 19. Be it further enacted, That all laws and parts of laws in conflict with this act are hereby repealed, and that this act take effect from and after its passage, the public welfare requiring it.

Passed March 31, 1903.

ED. T. SEAY,
Speaker of the Senate.

L. D. TYSON,
Speaker of the House of Representatives.

Approved April 3, 1903.

JAMES B. FRAZIER,
Governor.

STATE OF TENNESSEE,
OFFICE OF SECRETARY OF STATE.

It is hereby certified that the foregoing is a true and correct copy of Senate Bill No. 257, to authorize the city of Knoxville to own and operate a system of waterworks, passed by the General Assembly, 1903, State of Tennessee.

Witness my hand and Seal of Office, at Nashville, Tennessee, this April 10, 1903.

[SEAL.]

JOH W. MORTON,
Secretary of State.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

KNOXVILLE WATER COMPANY, Plaintiff in Error,

vs.

THE MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE.

No. 212.

BRIEF AND ARGUMENT FOR THE DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

This action was brought by the Mayor and Aldermen of the City of Knoxville, Tenn., a municipal corporation, hereinafter called the City, against the Knoxville Water Company, a domestic corporation, chartered to furnish water to said City and its inhabitants, hereinafter called the Water Company, to recover the prescribed penalty for the violation of an ordinance of said City, by charging a private consumer a higher rate for water than that fixed by said ordinance. The Water Company admits the violation of the ordinance, but insists, by way of defense, that the ordinance is void.

Divers objections were made to the validity of this ordinance. All of these objections were overruled by the Supreme Court of the State and the ordinance sustained in every particular. The

Water Company has proscuted writ of error. Most of these objections involved no Federal question, and as to objections of this character the decision of the Supreme Court of the State is conclusive and not subject to review on this writ of error.

The objections to the validity of this ordinance, which present Federal questions that may be reviewed by this Court on writ of error, are:

(1) That the ordinance impairs the obligation of certain contracts between the City and the Water Company, in contravention of Sec. 10, Art. I., of the Constitution of the United States.

The contention on this point is that the City had, before the passage of said ordinance, contracted with the Water Company to relinquish its right to regulate the rates and charges of the Water Company for water furnished to the inhabitants of said City.

(2) That said ordinance deprives the Water Company of its property and liberty without due process of law.

The contention on this point is that the rates fixed by the ordinance were unreasonable, confiscatory and oppressive; that they were fixed arbitrarily, without previous investigation and without notice to the Water Company, and that they were intended by the City to depreciate the value of the plant, in order to enable the City to purchase it at an inadequate price under an option reserved in the contract. It is likewise insisted that the ordinance in question interferes with the contracts of the Water Company with its consumers.

It is proper to state that this second objection to the validity of the ordinance was not seriously pressed in the State Court.

The defense that the rates fixed by the ordinance were unreasonable, oppressive and confiscatory was waived and abandoned by the Water Company, no evidence offered in support of it, and by consent of the Water Company pre-termitted in the decision of the Supreme Court of the State.

See Opinion of the Supreme Court, Rec. pp. 221-7.

It was likewise conceded in the State Supreme Court in the brief of counsel that the existing rates of the Water Company

were only "slightly" in excess of the rates and charges prescribed by said ordinance, and that some of them were even lower than the rates prescribed by the City ordinance in question.

Record, p. 184.

Again, it is said in the brief that the difference between the rates of the two schedules "is very small."

Record, p. 196.

These concessions refute the charge, which is sustained by no evidence whatever, that it is the purpose of the City to depreciate the value of the water plant in order to avail itself of the right to purchase under its option, at an inadequate price.

The insistence that the ordinance interferes with the Water Company's contracts with its customers in such a way as to impair them, if such insistence were material, is wholly unfounded. These contracts, some of which are set out in the record, are mere applications on the part of the consumers, signed alone by the consumer, to obtain water and pay for the same "in accordance with the rates, rules and regulations of the Knoxville Water Company, as *now or hereafter in force,* and which are made a part of this contract." These contracts run only for one year and that period had expired.

Record, p. 185.

The Water Company could not, even had it undertaken to do so, have deprived the City of the power to regulate water rates by making contracts with its customers inconsistent with that right, but it has not undertaken to do this, as appears from the contracts themselves.

These contracts provide on their face for the adjustment of future charges and for changes in the rates. There is no proof in the record to show that the City did not make full inquiry before passing said ordinance, or that it did not give the Water Company full opportunity to be heard. But this is, as the State Court holds, wholly immaterial, as the Water Company had the right in this or another proceeding, to have full investigation of the question of the reasonableness of the rates prescribed by the ordinance

after it had been passed and gone into effect. Besides, the Water Company concedes in this proceeding the reasonableness of the prescribed rates by waiving any inquiry upon that question, and by admitting that they are substantially the same as its own rates, in its general effect upon its earnings and income. So that it appears that the decision in this case must turn mainly upon the question whether the City had by valid contract made before the passage of said ordinance with the Water Company, relinquished its right to regulate the rates and charges to be made by the Water Company for water furnished the inhabitants of said City.

The Water Company's position is that the City possesses no right of regulation, however reasonable or necessary that regulation may be. The City's contention is that it has the power, which has never been relinquished by contract or otherwise, to make reasonable and necessary regulation of the rates of said Company, for the protection of its inhabitants.

The essential facts bearing upon this question are these:

1st. The City of Knoxville had prior to 1882 been incorporated by special acts of the Legislature. For convenience such portions of all the statutes constituting the charter of said City as relate to this subject are presented in Appendix "A" to this brief and are therein set out in *haec verba* and in full.

2nd. The Knoxville Water Company in January, 1882, perfected its charter, granted, not by special act of the Legislature, which has been forbidden by constitutional provisions since 1870, but under a system of general incorporation laws that obtains in Tennessee.

The first and principal act constituting this system was passed in 1875.

See Session Acts 1875, Chap. 42.

This act was passed for the purpose of conforming the corporation laws of the State to the change made necessary by the Constitution of 1870, forbidding incorporation by special acts of the Legislature, and requiring the same to be done by and under general laws. This act classifies corporations with reference to their objects, and prescribes the method of obtaining charters,

defines the general powers of corporations, and sets out forms of charters for many classes of corporations. In this act, however, no provision was made for the incorporation of water companies. This omission was supplied by an amendment of the Act of 1875, passed March 27, 1877.

See Session Acts 1877, Chap. 104.

This latter act prescribes the form of charter for a water company for the first time. It confers upon such companies the general powers prescribed by the Act of 1875. Among other things which are made parts of its charter, or conditions upon which such charter may be granted and such company operated, are the following: "The Company shall have power and is hereby authorized to bring into said city, town or village, a sufficient supply of water by means of pipes, or tanks, or in any other way, and to construct reservoirs for the reception thereof, and to supply with water the inhabitants of said city, town or village, and to the environs thereof, and to all who may be along the line of said Company's pipes, and to erect hydrants or fire-plugs within said town, city or village, and to contract with said inhabitants and with the corporate authorities of said town, city or village, or any incorporated companies for the use of said water, and to charge such prices for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable regulations and rules respecting the use and waste of said water as the Directors of said Company may from time to time prescribe. * * * *Provided,* That nothing herein contained shall be construed to compel the inhabitants of said town, city or village to use the water so introduced by said Company, or to prevent them from using water obtained in any other way." These provisions are copied *verbatim* into the Water Company's charter.

Record, pp. 52, 53.

Again, Sec. 2 of said Act provides that "such charter shall not be granted until after leave to operate under the same shall have been first had and obtained from the corporate authorities of the city, town or village in which it is proposed to operate such

waterworks, and such leave shall be certified by the Mayor or Recorder upon such application and registered with it. *And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of said city, town or village, and such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by such Company."*

The general incorporation statute of 1875, of which the Act of 1877 is amendatory, contains the following provisions: "By no implication or construction shall a corporation be deemed to possess any powers, except those hereby expressly given, or necessarily implied from the nature of the business for which the charter is granted, and by no inference whatever shall said corporation possess the power to discount notes," etc.

Session Acts of 1875, Chap. 142, p. 237.

The provisions of the general law are to be read into the face of the charter, whether written therein or not.

People vs. Chicago Gas. T. Co., 130 Ill., 268.

Again, "The right is reserved to repeal, annul or modify this charter. If it is repealed, or if the amendments proposed, being not merely auxiliary, but fundamental, be rejected by a vote representing more than one-half of the stock of the corporation, the corporation shall continue to exist for the purpose of winding up its affairs, but not entering upon any new business," etc.

Session Acts 1875, Chap. 142, p. 237.

The charter of the Knoxville Water Company, issued under and pursuant to these laws, will be found on pages 51-3 of the record, and embodies, either expressly or by necessary implication, all of the above provisions of the law authorizing its issuance. It purports to be a charter for the sole purpose of constructing waterworks in or near the City of Knoxville for the purpose of furnishing the corporate authorities and the inhabitants of said City and its environs with water.

3rd. On the 1st day of July, 1882, the Water Company entered into a contract with the City of Knoxville, consisting of divers stipulations on the part of the Water Company, embodied

in twelve paragraphs, and divers other stipulations on the part of the City.

Record, pp. 5-12.

Among other stipulations made by the Water Company in said contract are the following:

1st. To erect a water plant of sufficient capacity to supply the city and its inhabitants with water, and to maintain the same for a period of thirty years from the 1st day of January, 1883.

2nd. "Said Company will supply private consumers with water at a rate not exceeding 5 cents per 1,000 gallons, provided, however, which is expressly understood, that the entire cost of introducing from the mains into the private premises, including the cost of meter when used, shall be borne by the parties introducing or ordering the same, and that no main or distributing pipe shall be tapped by any person except a plumber licensed for said purpose by said Company."

The City on its part contracted and agreed to give to the Water Company the use of the streets, lanes, alleys, public squares, etc., for the purpose of laying pipes, mains, etc., and making repairs, and to pass such penal ordinances as would protect the Water Company in the enjoyment of its franchise.

The City likewise contracted and agreed to pay a rental for 75 hydrants at the rate of $50.00 per annum, and $50.00 each for such additional hydrants as might be required, and to pay the hydrant rental for water to be furnished the City for its own use through said hydrants.

The City likewise obligated itself not to grant to any other person or corporation any contract or privilege to furnish water to the City of Knoxville or the privilege of entering upon the public streets, lanes or alleys or other public grounds, for the purpose of furnishing said City or the inhabitants thereof with water, for the full period of thirty years from the 1st day of August, A. D. 1883, provided the Company complied with the requirements imposed and assumed by it under and by virtue of this agreement.

Record, p. 9.

This last provision is forbidden by the Act of 1885 and not authorized by any previous legislation. There was likewise a mutual stipulation in this contract, by which the City of Knoxville reserved the right, or option, to purchase the Water Company's plant, after the expiration of fifteen years, upon a notice of one year, at a price to be agreed upon by the parties, or, in case of failure to agree, to be fixed by arbitration.

These are the material portions of said contract, so far as it relates to the question under consideration.

4th. After the contract of July, 1882, under which the Water Company constructed its plant and operated it for some years, and before the contract of 1899, to be hereinafter stated, was made, the Water Company had acquired or contracted for other water plants, occupying adjacent territory, and this territory had been admitted within the corporate limits of the City of Knoxville.

These water plants were:

(1) The North Knoxville plant, erected by Wheeler & Parks, under a contract with that municipality, the stipulations of which contract were similar in all material respects to those of the contract between the City of Knoxville and the Knoxville Water Company, already stated. This contract provided that water should be furnished the City of North Knoxville, for its use, upon the payment of certain hydrant rentals, and to its inhabitants and suburbs, upon no less favorable terms than shall from time to time govern its use in the City of Knoxville.

The 9th section of this contract provides that "water to be furnished private customers shall be charged for at not exceeding the rates contained in the following schedule." Then follows an extensive schedule of annual rates for water furnished by fixtures and by meters. It is further provided in said contract that the Water Company shall furnish water, "subject to all reasonable requirements of the Town Council of North Knoxville."

Record, p. 70.

There was a provision likewise that these works should be constructed and operated by a company to be chartered under the laws of the State of Tennessee.

Record, pp. 70-78.

In 1893 this contract was assigned by Wheeler & Parks to the Knoxville Water Company. The latter Company assumed all of its obligations. It runs until January 2, 1913.

(2) The Lonsdale-Beaumont Water Company was constructed and operated under a contract with the municipality of West Knoxville. The charter of this Company was issued in 1891, and is substantially the same as that of the Knoxville Water Company.

Record, pp. 57-60.

The contract between this Company and the City of West Knoxville was made September 17, 1892, and is substantially the same as that made between Wheeler & Parks with the City of North Knoxville.

Record, pp. 62-70.

It provides on the subject of rates to be charged consumers, other than the municipality, for water, as follows:

"SEC. XI. The said Grantees shall not charge consumers, during the continuance of the franchise granted by this ordinance, exceeding the following maximum rates, these rates, however, to be subject to 10 per cent. discount on bills made except those where water is metered, or used for fire protection, mechanical or manufacturing purposes, if settled within ten days of their date."

Then follows a schedule of annual rates upon fixtures and meters. This contract runs twenty years from its date. This Company was purchased by the Knoxville Water Company, under proceedings to be hereinafter stated.

The statute authorizing the purchase of one water company by another, or their consolidation, is made Appendix "B" hereto. It provides, among other things, that the purchasing company shall hold the plant and property purchased "as a part of its corporate property, the same to be held, owned and enjoyed and operated by the purchasing company, under its own charter, just as if it had originally built or acquired said property under its own charter."

Session Acts of 1889, Chap. 166.

It is proper to state in this connection that the Cities of Knoxville, North Knoxville and West Knoxville were consolidated by an Act passed in 1897.

Session Acts, 1897, Chap. 323.

By the terms of this consolidation Act the new City of Knoxville assumed the obligations of North and West Knoxville, and it is provided that the City of Knoxville shall have the benefit of all contracts made with the cities of North and West Knoxville, and the right to enforce the same, and that the restrictions, obligations and limitations upon persons and corporations, holding franchises and privileges from any of the consolidated municipalities, shall not be in any respect affected by the consolidation, but shall remain in all respects as before consolidation, with the right of the consolidated municipality to enforce the same.

5th. On October 20, 1899, the City of Knoxville passed an ordinance, consenting to the acquisition of the Lonsdale-Beaumont water plant by the Knoxville Water Company, and released the latter Company from a bond limit of $150,000, imposed by the original contract, and made other additional stipulations.

Record, pp. 13-17.

This ordinance was accepted by the Knoxville Water Company and the Lonsdale-Beaumont Water Company, and thereby the property of the Lonsdale-Beaumont Water Company became the property of the Knoxville Water Company. This contract made no change in the former contracts relating to water rates or their regualtion, but provided expressly for their maintenance in these words: "Provided always that said Knoxville Water Company shall furnish to the people living in what is now the Tenth Ward of the City of Knoxville (being the territory formerly known as the territory of West Knoxville), as well as those who may hereafter live in said territory, clear, good and wholesome water, free from all sewage and other contamination, equal in quality to that now supplied by the Knoxville Water Company to the City of Knoxville, and at a maximum rate not exceeding that fixed in the ordinance and contract of September 17, 1892, being the contract between the Lonsdale-Beaumont Water Company and

the Town Council of West Knoxville, and shall keep up the pressure provided for in said contract and ordinance, and shall in all other respects maintain and carry out the provisions of said contract unimpaired, except as modified in this ordinance."

And it further provided that "said consolidated Knoxville Water Company, succeeding as aforesaid, to all the rights, priviliges and franchises of both Companies, shall also furnish to the people living in the remaining wards of the City of Knoxville, other than said Tenth Ward, or who may hereafter live in said remaining wards, or such wards as may be hereafter added to the City of Knoxville, filtered and wholesome water, or water equal in quality to the filtered water now being furnished by said Knoxville Water Company, at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the City of Knoxville, dated July 1, 1882, and the schedule of rates and charges now in force and operation by the Knoxville Water Company."

6th. On the subject of water rates the City and the Water Company have taken respectively the following action:

(a) It does not appear what action was taken by either party prior to 1895, or what rates prevailed prior to that date.

(b) On April 1st, 1895, the Water Company promulgated a "Schedule of Annual Rates for the Use of Water," found on pages 87-96 of the record.

Under this schedule it will be observed that by far the greater number of customers are required to pay for water by fixture charges, and not by the gallon. No change of the rates has been made by the Water Company since 1895.

By this schedule the Water Company reserved "the right to attach a meter to any service at its option, and in lieu of the above rates (meaning fixture rates) to charge the following: A graduated scale of meter rates is then set out. Then follows this provision: "Provided that the minimum meter charge shall not be less than $10.00 per annum and meter rent." Meter rent is then fixed at two dollars per annum for domestic services.

Thus it appears that the Water Company assumed and re-

served this supposed right, at its sole option, to arbitrarily transfer all customers having the right under this schedule to water at fixture rates, ranging from $2.00 to $2.50, $5.00 and $8.00 and upwards per annum, payable quarterly, to a meter rate of at least $12.00 per annum, payable monthly.

(c) On the 17th day of May, 1895, the City, in the exercise of its power to regulate the Water Company's action in furnishing water to consumers, passed an ordinance the purpose of which was to correct the inequalities and hardships of said schedule of April 1, 1895. This ordinance contained the following important provisions:

(1) That any private water consumer was entitled, upon his own option, to have the Water Company furnish him water service by measurement through and by a meter.

(2) It fixed maximum meter rates to customers, the same as in the Water Company's schedule of April 1, 1895, but made the bills payable at the end of the month, instead of in advance, and subjected them to a discount of 10 per cent. if paid on or before the 10th of the succeeding month.

(3) The Water Company is not authorized or permitted, as it undertakes to do in its said schedule, to substitute arbitrarily a fixture rate by a much more burdensome meter rate.

It is clear from this ordinance that the City in 1895 understood that it had the right and power to regulate the rates charged by the Water Company, and that it undertook to exercise the power of regulating both the price of water to be furnished private consumers, and the manner in which it should be furnished by the Water Company.

(d) On the 30th day of March, 1901, the City passed the ordinance whose validity is assailed in this case. This ordinance, as counsel for the Water Company concedes, makes only "slight," or "very small" reduction of rates—in fact, increasing some of them.

For a period of six years there had been no readjustment of rates. The Water Company had in the meantime extended its operations by the acquisition of the competing plant of the Lons-

dale-Beaumont Water Company. Its business had increased to 4,500 or 4,600 private consumers. The City had grown rapidly in population, having by the Census of 1890 22,535 inhabitants and by the census of 1900 33,627 inhabitants. The rates charged by the Water Company were not uniform over the City, and in some respects, notably meter rates, were arbitrary. These facts were deemed sufficient to authorize a "slight," or "very small" reduction in rates, which the Water Company had deemed satisfactory six years before.

This ordinance adopts, in the main, the classification of the former schedule, but equalizes rates over the city and rescues the customer from the arbitrary action of the Water Company, which, if its present contention is correct, may, at its option, double the rates of 1895. It prescribes a penalty of not less than $10 nor more than $50 for its violation. This is the penalty sued for in this case.

(7) The Supreme Court of the State of Tennessee sustained said ordinance, holding that the Legislature of the State has the power to regulate the charges of public utilities, such as water companies, and the right to delegate such power to municipalities; and that such power of regulation had been conferred by statute upon the City in this case, and in effect that neither the City nor the Water Company were authorized under the laws of the State and their respective charters to make any contract in derogation or limitation of this power of the City; and that in fact no such contract had been made between the City and the Water Company. The Court likewise held that the power of regulation was a continuing one, which was not exhausted by a single exercise of that power.

II.

ARGUMENT.

(1) The decision of the Supreme Court of the State sustaining said ordinance of March 30, 1901, and holding that it did not violate the obligation of any contract between the City and the Water Company, is correct.

The State had undoubted power to regulate the rates of the Water Company by statute. It was clearly competent for it to delegate that power to the City. The statutes of the State have, in unmistakable terms, delegated to municipalities the power to regulate by ordinance, the price of water to be furnished to the inhabitants of a city by water companies. Under the statutes and the respective charters of the City and the Water Company neither the City nor the Water Company had the power to enter into any valid contract, in derogation or limitation of the City's power to regulate the rates of the Water Company. And upon a consideration of the alleged contracts and ordinances, relied upon by the Water Company as constituting such contract, it is clear that the City did not in fact, enter into any contract in derogation or limitation of its right to regulate the prices of the Water Company. And, whatever contract was made, was revocable.

It has been settled that the State, by direct enactment of its Legislature, or by authority delegated by the Legislature to counties or municipalities, may regulate public utilities and the rates to be charged by corporations or individuals, rendering any service to the public. This doctrine has been applied to elevators, telephones, gas companies, water companies, and other public and *quasi public* servants.

Munn vs. Warehouses, 94 U. S., 133.

R. R. Commission Cases, 116 U. S., 307, 347-352.

Spring Valley Water Works vs. Schlotter, 110 U. S., 347.

Turnpike Co. vs. Crcxton, (Ky.) 33 L. R. A., 177 and Note.

San Diego Water Co. vs. San Diego, (Cal.) 62 Am. State Reports, 261 and Note.

Danville vs. Danville Water Co., (Ill.) 69 Am. State Reports, 304.

Rogers Park Water Co. vs. Fergus, (Ill.) 69 Am. State Reports, 315.

The authority of the City to regulate the rates of the Water Company is found in the general incorporation act of the State under which the Water Company obtained its charter, in these words: "And this Act (meaning this statute) is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, *and such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by such company.*"

Session Acts of 1877, Ch. 104, Sec. 2.

Thus is appears that the right of the City to regulate the rates of this Company must be treated as if written into the face of its charter, and as a condition of its existence.

People vs. Chicago Gas Co., 130 Ill., 268.

K. of P. vs. Wells, 93 Tenn., 605.

Central Trans. Co. vs. Pullman Palace Car Co., 139 U. S., 24.

In order that any contract between the City and the Water Company, in restraint or limitation of the City's power to regulate water rates shall be valid, such contract must be within the corporate powers of both corporations.

Central Trans. Co. vs. Pullman Palace Car Co., 139 U. S., 24.

Thomas vs. R. R. Co., 130 U. S., 30. 32 Lawyer's Edition, 843.

R. R. Co. vs. R. R. Co., 118 U. S., 297. 30 Lawyer's Edition, 176.

R. R. Co. vs. R. R. Co., 130 U. S., 26. 32 Lawyer's Edition, 842.

So that the alleged contract relied upon by the Water Company in this case is invalid, if either the City or the Water Company was not authorized by its charter or the laws of the State to make it, and, *a fortiore*, it is invalid if forbidden by positive provision of the law.

"A contract of a corporation, which is *ultra vires* in a proper

sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the Legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it, * * * but when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other parties to the contract, can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."

Central Trans. Co. vs. Pullman Palace Car Co., 139 U. S., 24. 35 Lawyer's Edition, 681.

In the case quoted, after an examination and analysis of the former decisions of this Court, Mr. Justice Gray sums up thus: "The charter of a corporation, read in the light of any general laws, which are applicable, is the measure of its powers, and the enumeration of those powers, implies the exclusion of all others, not fairly incidental. All contracts made by a corporation beyond the scope of those powers, are unlawful and void, and no action can be maintained upon them in the Courts, and this upon three different grounds—the obligation of every one contracting with a corporation to take notice of the legal limit of its powers; the interest of the stockholders not to be subjected to risks which they have never undertaken; and above all the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

Idem, p. 64 of Lawyer's Ed.

Certain rules for the construction of charters and of corporation laws are well settled.

In Thomas vs. R. R. Co., 101 U. S., 82,

It is said: "The power of corporations organized under legislative statutes are such, and such only, as those statutes confer."

Cited with approval in *Central Trans. Co. vs. Pullman Palace Car Co., supra.*

Perrine vs. Canal Co., 9 Howard, 184.

Cass vs. Manchester Iron & Steel Co., 9 Fed. Rep., 640.

Danville vs. Danville Water Co., (Ill.) 69 Am. State Reports, p. 304.

This principle is embodied in the general incorporation laws of the State of Tennessee, under which, or in amendment of which, the Water Company's charter was issued, in these words: "By no implication or construction shall a corporation be deemed to possess any powers, except those hereby expressly given, or necessarily implied from the nature of the business for which the charter is granted," etc.

Session Acts, 1875, Ch. 142, Sec. 5, p. 237.

Again, it is said in *Central Trans. Co. vs. Pullman Palace Car Co., supra,* that "by a familiar rule, every public grant of property or franchises or privileges, if ambiguous, is to be construed against the grantee and in favor of the public, because the intention on the part of the government to grant to private persons, or to a particular corporation, property or rights, in which the whole public is interested, cannot be presumed, unless unequivocally expressed, or necessarily to be implied in the terms of the grant, and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or his agents, and therefore the words used are to be treated as those of the grantee. And this rule of construction is a wholesome safe-guard of the interests of the public against any attempt of the grantee by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. (Citing cases.) * * * This rule applies with peculiar force to articles of association, which are framed under general laws, and which are substituted for a legislative charter, and assume to define the powers of a corporation, by a mere act of the associates, without any supervision of the Legislature or of any public authority."

See *Ross-Meacham Brake Co. vs. Southern etc. Co., 72 Fed.*

Rep., 958, construing the general incorporation laws of the State of Tennessee.

Bearing these principles in mind, we proceed to inquire whether the City of Knoxville had, under its charter and the laws of the State, the power to surrender by irrevocable contract with the Water Company, its right and authority to regulate the rates and prices of water to be furnished to the inhabitants of the City.

This question must be determined from a consideration of the charter acts of said City, and such general laws, if any, as are applicable to the subject. "Apart from the few faculties incident to the existence of a municipal corporation, such as the corporation's right to sue and be sued and have a common seal, it has no power to do any act, except such as is essential to the plain purpose of its creation, or is authorized by the express provisions of its charter, or by a clear or necessary implication therefrom. Powers will not be implied simply because they may be convenient, but they must be indispensable, and any fair or reasonable doubt concerning the existence of any power is resovled against such croporation."

In Re Lee Tong, 18 Fed. Rep., 253.

Scott's Exctrs. vs. Shreveport, 20 Fed. Rep., 714.

Los Angeles City Water Co. vs. Los Angeles, 88 Fed. Rep., 720.

The City of Knoxville was chartered by special act of the Legislature, and there are no general statutes bearing on the question of its powers.

The charter acts, so far as pertinent to this inquiry, are fully set out in Appendix "A" to this brief. The original charter Act of 1815 contained no provision on the subject of a water supply for the City or its inhabitants. At that date Knoxville was a village, having abundant water supply for its inhabitants in its numerous springs, cisterns, creeks, and the Tennessee River. Not until 1838 was any provision made by law in regard to a water supply for said city and its inhabitants. In an amendment of its charter of that date, the City was authorized to borrow money, not exceeding $50,000, for the purpose of erecting waterworks,

and supplying the town with water, and to issue bonds and script of the corporation for that purpose. This statute manifestly contemplated the erection of waterworks by the City itself, and did not authorize the making of any contract with any independent company for that purpose. No other legislation on this subject occurred until 1866, when, by another amendment of the City charter, the Mayor and Aldermen of the City of Knoxville were "invested with all the rights, authorities and privileges that had been theretofore conferred by law upon the City of Nashville."

Looking to the statutes incorporating the City of Nashville, enacted prior to 1866, we find that City had been empowered to receive and hold property, real and personal, to be used for the erection of waterworks and other purposes; and had been likewise empowered to provide the City with water by waterworks, within or beyond the boundaries of the City, and to provide for the prevention and extinguishment of fires, and to organize and establish fire companies.

These were the only powers conferred upon the City of Knoxville by the statute of 1866, incorporating into its charter the powers, etc., of the City of Nashville. It is manifest that the City of Nashville, and as a consequence, the City of Knoxville, had no other powers with reference to a water supply, under these statutes and provisions, than to acquire property for the erection of waterworks, and to erect them by the direct act of the City. There is no intimation of a power to enter into a contract for that purpose with an independent company.

These were the charter powers and the only powers on this subject possessed by the City of Knoxville in 1882, when it entered into the contract with the Knoxville Water Company, the obligation of which, it is insisted, has been violated by the City ordinance of March 30, 1901, and hence the authority for the making of that contract by the City, if any such authority existed at all, must be found in the Act of 1877, amending the general incorporation laws of the State, (and not relating to the subject of municipal corporations,) under which the Water Company obtained its charter. This Act will be noticed in another connection.

By the Act of 1885, passed subsequent to the making of said contract of 1882, the powers of the City of Knoxville with reference to its water supply were somewhat enlarged. That Act provides, as did former Acts on the same subject, that the City might purchase, receive and hold property, real and personal, within or beyond the boundaries of the City, to be used for the erection of waterworks, etc. It likewise provided that the City should have the power to provide itself with water by waterworks, within or beyond the boundaries of the City, "or provide for supplying the City with water otherwise." The clause above quoted, to-wit: "or provide for supplying the City with water otherwise," is the only authority contained in this Act under which the City can be authorized to contract with an independent company for a water supply. Whether this clause means that the City may provide a water supply otherwise than by waterworks, or that it may provide for a water supply otherwise than by the erection of such works by itself, may admit of doubt. However, it may be treated, for the purpose of this argument, as empowering the City to contract with an independent company for a water supply, although it does not so state in terms. The Act likewise authorizes the City to condemn property for waterworks purposes, but forbids the granting of the exclusive use of its streets for any purpose, to any one person, company or corporation. This Act was in force when the contract between the City and the Water Company, embodied in the ordinance passed by the City in 1899, was made.

Giving this statute the fullest scope that can be insisted upon by the Water Company, it does no more than to authorize the City to contract with an independent company for supplying the City and its inhabitants with water. It contains no reference to the subject of water rates, and authorizes the making of no contract on that subject, but if it shall be treated as authorizing the City to contract with reference to water rates, it falls even then far short of giving the City the authority to surrender the power to regulate those rates. In order to sustain the Water Company's contention that it has an irrevocable contract, the obligation of

which is violated by the ordinance of March 30, 1901, regulating the rates that it may charge to the inhabitants of the City for water, there must be found authority in the charter acts of the City, or elsewhere, for the City to contract, not only for the erection of waterworks and the making of a contract with reference to rates, but the power in addition to exempt the Water Company from the City's regulation of those rates. The power to contract rates is a different thing from the power to surrender proper, reasonable and necessary regulation of those rates. There is not an intimation of any such power in any of the charter acts of the City of Knoxville, and any such contract, even if made, would be, as to the City, *ultra vires* and void.

The power of the State and of its municipalities to regulate water rates is a governmental function, essential to the protection of the citizens, and the power of the municipality to surrender such function and abandon its citizens to the arbitrary action of the Water Company must be conferred in clear and explicit terms, or it cannot be held to exist. The surrender of such a power is in the nature of an exemption from taxation, and not favored by the law. As was said by Mr. Justice Shiras, delivering the opinion of the Court in *R. R. vs. Kentucky, 183 U. S., 517:* "It is scarcely necessary to argue or to cite authority for the proposition that a contract of exemption from future general legislation, either by a constitutional provision or by an act of the Legislature, cannot be deemed to exist, unless given expressly, or unless it follows by an implication, equally clear with express words."

In the *R. R. Commission Cases, 116 U. S., 307; 29 Lawyer's Ed., 636,* Chief Justice Wait, delivering the opinion of the Court, uses this language, on this subject:

"This power of regulation is a power of government, continuing in its nature, and if it can be bargained away at all, it can only be by words of positive grant, or something which is in law equivalent. If there is reasonable doubt it must be resolved in favor of the existence of the power. In the words of Chief Justice Marshall, *in Providence Bank vs. Billings, 4 Peters, 514-66,*

'its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.' This rule is elementary and the cases in our reports where it has been considered and applied are numerous."

This language was quoted with approval in *Freeport Water Co. vs. Freeport, 180 U. S., 599; 45 Lawyer's Ed., 688.*

Mr. Justice White, in his dissenting opinion in the last named case, says: "It is unquestioned also, that where a right asserted, if enforced, will put a contractual limitation upon the power of the lawmaking authority of the State, presumably to be exercised for the public benefit, doubt is to be resolved in favor of the continued existence of the lawmaking power. In other words, that no contract limitation on the powers of government can be upheld by mere implication, or sustained if there be doubt on the subject. The existence of such a contract limitation must arise clearly and by such express intendment."

In the case at bar the authority of the City to contract with the Water Company is much more limited than the power conferred for that purpose upon the cities and villages of Illinois, by the statutes of that State, considered by this Court in the several cases reported in *180 U. S.*, and held by the majority of the Court insufficient to authorize cities to make an irrevocable contract with a water company with reference to water rates for a period of thirty years.

Under the statutes of Illinois construed in those cases, the cities and villages were authorized to contract with incorporated companies for a supply of water for public use, at such rates as might be fixed by ordinance, and for a period not exceeding thirty years. By another section of the Act, which is a distinguishing feature of those cases, the city or village so contracting with the water company was authorized to levy and collect a tax, upon all taxable property, within such city or village, to pay for the water so supplied.

See Freeport Water Co. vs. Freeport, 180 U. S., 587-618. 45 Lawyer's Edition, p. 679.
Danville vs. Danville Water Co., 180 U. S., 619-24. 45 Lawyer's Edition, p. 696.

In the case of *Rogers Park Water Co. vs. Fergus, 180 U. S., 624-33*, this Court, in construing an ordinance which provided that the water company "shall charge the following annual rate to consumers of water, during the existence of this franchise," held that such a provision was a mere regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise.

It will be observed in these Illinois cases the Court construed statutes or ordinances, in which there was an express provision on the subject of water rates, or on the subject of contracting or fixing water rates, while there is no such provision at all in any of the cases chartering the City of Knoxville.

See likewise Turnpike Co. vs. Croxton, (Ky.) 23 L. R. A., 177 and Notes.

Danville vs. Danville Water Co., 69 Am. St. Rep., 304.

Rogers Park Water Co. vs. Fergus, 178 Ill., 571.

San Diego Water Co. vs. San Diego, (Cal.) 62 Am. State Rep., 261.

The Supreme Court of the State of Tennessee has construed the provisions of the charter of the City of Knoxville as conferring no authority for making an irrevocable contract by the City with the Water Company, and while this decision is not conclusive upon this Court, it will be given great weight, where, as in this case, there must be, to say the least of it, great doubt as to the existence of the power, contended for by the Water Company.

R. R. Co. vs. Ky., 183 U. S., 503. 46 Lawyer's Ed., 298.

Williams vs. Gaylord, 186 U. S., 157. 46 Lawyer's Edition, 1102.

It is not material to inquire as to the powers of the cities of North Knoxville and West Knoxville to contract with the water companies, inasmuch as the statutes under which those companies became incorporated with, or the property of the Knoxville Water Company, provides that the property and working franchises of those companies, including its realty, its pipes, connections, engines, pumps, and all else that pertains to those companies, shall be held, owned, enjoyed and operated by the Knoxville Water

Company, "under its own charter, just as if it had originally built or acquired said property under its own charter." But the charters of those municipalities will be found to be substantially the same in all material particulars as that of the City of Knoxville. Both of said corporations were consolidated with the City of Knoxville since that date. An exemption of this character, like an exemption from taxation, is personal to the grantee, and not transferable.

We shall next inquire as to the power of the Knoxville Water Company, under its charter and the laws of the State, to make a contract with the City of Knoxville, by the terms of which the City surrenders absolutely its right of regulation of the rates to be paid by consumers for water furnished by that company.

As already stated, the incorporation of private or *quasi* public companies by special acts of the Legislature has been forbidden by constitutional provision since 1870. The Knoxville Water Company was chartered under a system of general incorporation laws, consisting of the original Act passed in 1875, and amendments since made. There was no provision prior to the Act of 1877 authorizing the incorporation of water companies.

The Knoxville Water Company was incorporated in 1882, under the provisions of said Act of 1877, which was an amendment of the original Act of 1875, extending its general provisions to water companies. The powers of the Knoxville Water Company must be found in its charter, and in the provisions of these acts, and nowhere else.

These acts provide the forms of charters for the several classes of companies. The Water Company derives its rights and franchise from this legislation, and must accept and hold them subject to the limitations and restrictions imposed upon the grant by the statutes. The State is at liberty to create and grant corporate franchises or to refuse to do so. If it chooses to create them, the State is at liberty to grant such rights and powers, and only such, as in its wisdom it chooses to grant, and to impose such limitations and restrictions as it chooses to impose. No citizen is under obligation to accept a corporate franchise, or to invest his

money upon the faith of such franchise, but if he voluntarily does so, he must accept it and exercise it under the limitations and restrictions imposed by the law making the grant. He cannot complain of the hardship or even the unreasonableness of such restrictions or limitations, for he is at liberty to accept or reject the franchise in the first place, and thereby to avoid the assumption of any of the obligations that the law imposes.

This Act of 1877, under which the Water Company obtained its charter, and exercises its franchises, requires a water company before, and as a condition to its erection of a water plant within a city, for the purpose of supplying a city and its inhabitants with water, to obtain the consent of the city to the use of its streets for that purpose. This is one of the conditions upon which it is allowed to erect and maintain its plant within the city. Another condition that is imposed is in these words: "And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power, by ordinance, to regulate the price of water supplied by such company." It is thus made a condition of the existence of a water company proposing to erect a plant within a city and to supply the city and its inhabitants with water, that such grant shall not impair the police or general powers of the city authorities, and that the corporate authorities shall, notwithstanding such grant to the Water Company, have power by ordinance to regulate the price of water supplied by such company. In other words, a Water Company is forbidden by the Act under which it acquires its charter and its franchise, and all of its rights and powers, to exist or operate within a city except upon condition that the police and general powers of the city shall not be thereby impaired, and that the price of water that it shall furnish to the City and its inhabitants shall be subject to regulation by the corporate authorities.

Has such a corporation the power to make a contract with the City, in direct violation of this provision and condition, written by the law, into the face of its charter, and to accept a surrender from the City of the powers thus conferred in express terms upon

the City, in language too plain and explicit to admit of construction or doubt?

Such power as that conferred upon the City by this statute is held to be a *condition* of the privileges thereafter granted to a water company.

Freeport Water Co. vs. Freeport, 180 U. S., 587. 45 b Lawyer's Edition, 679.

It is worthy of note in this connection that this statute of 1877 confers upon the City, as well as upon the Water Company, the only authority that either had for making the contract of 1882.

It will be observed that the power here conferred upon the City is not to "fix," or "establish," or "prescribe," or "contract" water rates, but to "*regulate*" them. To "regulate" is "to adjust by rule, method, established mode; to direct by rule or restriction; to subject to governing principles or laws."—*Webster.*

In the case of *St. Louis vs. Western Union Tel. Co., 149 U. S., p. 469; 37 Lawyer's Edition, p. 813,* this Court, construing a charter provision of the City of St. Louis, conferring the power to open and establish streets, and to regulate their uses, etc., said:

"The word 'regulate' is one of broad import. It is the word used in the Federal Constitution to define the power of Congress over foreign and inter-state commerce, and he who reads the many opinions of this Court will perceive how broad and comprehensive it has been held to be."

The use of this word indicates a purpose to confer large and ample powers upon the City for the protection of water consumers in the matter of rates. No other word, so appropriate, could have been used. The power to regulate is utterly inconsistent with and directly antagonistic to the power to make an unalterable contract, fixing specific rates. The power to regulate must, from its very nature, be a continuing one, in order to be effective, that may be called into exercise as often as changed conditions may require a readjustment of rates. From the nature of a water supply for a city, whose population is increasing, and whose demands for water are constantly growing, the power of regulation is a most important one.

It has been held in the construction of statutes and ordinances, authorizing a city or water company to fix or establish rates, that a single exercise of such a power does not preclude further exercise, upon proper occasion.

Osborne vs. San Diego Land & Town Co., 178 U. S., 22. 44 Lawyer's Edition, 962.

Freeport Water Co. vs. Freeport, 180 U. S., 587. 45 Lawyer's Edition, 679.

The purpose of the Legislature to confer ample power upon the City to regulate the price of water to be furnished by the Water Company to its inhabitants, and the necessity for such power, may be inferred from that provision of the charter act, and of the charter itself, authorizing the Water Company "to contract with said inhabitants and with the corporate authorities of said town, city or village, or with any incorporated companies, for the use of said water, and to charge such price for the same as may be agreed upon between said company and said parties, and consumers shall be subject to all such reasonable rules and regulations, respecting the use and waste of said water, as the directors of said company may from time to time prescribe."

It was doubtless in view of this provision authorizing the Water Company to contract, not with the City alone, but with its inhabitants singly that the Legislature, in a later provision of the Act, conferred upon the City, for the protection of its inhabitants, this ample power of regulation. In this respect the charter of the Water Company and the statute under which it was granted, differ materially from the Illinois statutes involved in the cases already cited.

The Illinois statutes provide that the contract for water supply should be made with the city, not with its inhabitants, and that the city should have the power to levy a tax upon the property of the city to pay for the same. Unless it had been clearly stated in the statute, it will not be presumed that the Legislature intended to turn over the inhabitants of the City to be dealt with singly and arbitrarily by the Water Company.

The question involved in the Illinois cases was the right of

the City to regulate the price of water contracted to be furnished to itself, upon the payment of stipulated hydrant rentals, and to reduce those rates below the price fixed in that contract. The Court was divided upon the question, but held that it was competent for the City to do so.

The ordinance under consideration in this case does not undertake to regulate or reduce the price of water furnished to the City, upon the hydrant rental contract, but simply to regulate the price of water furnished to its inhabitants.

An effort was made in the brief of counsel in the State Supreme Court to break the force of that provision of the statute of 1877, conferring upon the City power to regulate the price of water, by confining it to the preceding provision, as to the granting of leave by the City to the Water Company to operate its plant. It is difficult to understand how this would change the effect of this provision, as it would still remain a condition upon which leave to operate its plant was granted to the Water Company. The codifications of the Act by Milligan & Vertress, and by Mr. Shannon, are referred to, as changing the verbiage and meaning. Neither of these codifications is authoritative and neither of them was ever adopted by the Legislature of the State. The first was authorized, but rejected after it was made, and the latter is the work alone of an enterprising publisher. It is said that the word "Act," which is written with a capital "A" in the original statute, refers to the act of the corporation in granting leave, whereas, it is plain from a reading of the statute in the original session Acts that the word means "statute." This provision constitutes the last effective clause or sentence of the statute on the subject of water companies, and is a limitation upon all that precedes. Position is wholly immaterial.

Ferguson vs. Bank, 3 Sneed, 632.

In that case the language, "any company created by virtue of this Act," was held to embrace all of the companies named in the Act, although the provision in question was located in the middle of the Act, and after some of the companies and before others, the Court saying that the location of the provision was

not material. This limitation is coeval with, and a condition of, the very existence of a water company. It enters into its charter contract and every contract that it may make under its charter. The State Court was of opinion that the Water Company, as well as the City, was without authority to make any contract in restraint of the City's power of regulation, and this opinion construing a public statute of the State should have great weight.

Both the City and the Water Company have by their action assumed and conceded the existence of the right of regulation on the part of the City. The City by the ordinance of 1895 assumed and exercised the power of regulating meter rates, both as to the manner and the price of furnishing water through meters to consumers. It does not appear that the Water Company then or since that time contested the right of the City to enact that ordinance.

While the Water Company is authorized by its charter to contract with consumers, it has never assumed to make such contracts for a term longer than one year. This provision is found in its rules and regulations promulgated in 1895, and not since changed, to-wit: "All applications for the introduction and use of water must be entered upon the application book at the office of the Company, which is to be filled out, stating fully and truly the use to which the water is to be applied, and signed by the owner of the premises to be supplied, or a duly authorized agent, before the supply will be furnished; and said application shall constitute the contract between the Water Company and said owner for one year and to further bind said owner for this and such further time as the water shall be turned on, to pay the Water Company its established rates and to comply with all of its rules and regulations. At any time after the expiration of one year from the date of application, the water will be turned off at the option of the owner, on notice left at the office of the Company."

The charter of the Company provides that it shall not be compulsory upon the inhabitants of the City to take water furnished by the Water Company, and the law under which the Water Company's charter was granted further provides that if they do obtain

their water supply from the Water Company, the price to be paid by them shall be subject to regulation by the City. This right of regulation on the part of the City is one of the conditions or limitations upon the power of the Water Company to contract with consumers. The charter, as well as the law under which it was granted, seems to contemplate that the Company may contract with the City for the water to be furnished it, and with consumers individually for water to be furnished to them, but subject to an expressly conferred power upon the part of the City to regulate rates. The form of the contract made by the Water Company with consumers provides that the consumer shall agree to use and pay for water "in accordance with the rates, rules and regulations of the Knoxville Water Company, as now or hereafter in force, which is made a part of this contract." This contract is signed alone by the consumer. Thus it appears that the Water Company does not contract to furnish water, even for a single year, at the rates existing at the date of the contract, but reserves the power to furnish it at a different rate, if it shall voluntarily change its rates, or be required to do so by a regulation of the City.

The Supreme Court of the State, in holding that the City and the Water Company were not authorized to enter into any contract by which the City should be deprived of its power to regulate the price of water, has simply adopted the views that both the City and the Water Company entertained and acted upon. Thus it appears that neither the City nor the Water Company had the power under their respective charters or the laws of the State applicable thereto, to enter into any contract, even if they had undertaken to do so, in restraint or in derogation of the City's power to regulate water rates. It is sufficient to invalidate such a contract that either of the corporations was without power to make such a contract.

The question remains whether the City and the Water Company have entered into any contract by the terms of which, when properly construed, the City has surrendered or undertaken to surrender its power to regulate the price or rates of the Water Company, and if it has made, or undertaken to make such contract, whether the same is irrevocable.

The terms of the contract are to be gathered from the original contract of July 1, 1882, and the City ordinance of October 20, 1899, which was accepted by the Water Company, and incidentally from the contracts between North Knoxville and Wheeler & Parks, and West Knoxville and the Lonsdale-Beaumont Water Company. The material portions of these several contracts have already been hereinbefore set out. In each of these contracts were certain specific stipulations, relating to the supply of water to the City to be compensated by hydrant rental, at a fixed price per hydrant, and by the grant of the free use of the streets to the Water Company. Other and different provisions are contained in all of these contracts with reference to the supply of water to private consumers.

These provisions are as follows: In the contract of July 1, 1882, between the City of Knoxville and the Knoxville Water Company, it is provided that the Water Company "will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons."

Record, p. 7.

This, it should be borne in mind, is in form and in fact a stipulation on the part of the Water Company alone.

In the contract effected by the City ordinance, which was accepted by the Water Company, on the 20th of October, 1899, it was made a condition of the City's consent to the consolidation of the Water Company with the Lonsdale-Beaumont Water Company, that the Water Company should supply the inhabitants of West Knoxville with water of the stipulated quality "at a maximum rate not exceeding that fixed in the ordinance and contract of September 17, 1892, being the contract between the Lonsdale-Beaumont Water Company and the Town Council of West Knoxville." And further, that the Water Company should furnish water to the inhabitants of the City of Knoxville of the stipulated quality, "at a maximum rate not exceeding that fixed by the contract between the Knoxville Water Company and the City of Knoxville, dated July 1, 1882, and the schedule of rates and

charges now in force and operation by the Knoxville Water Company."

Record, p. 14.

As the Water Company holds and operates its entire plant, including North and West Knoxville, under its own charter, it is perhaps not material to inquire what rates prevailed in those municipalities before the acquisition of the North and West Knoxville plants by the Water Company. The consolidation Act requires the Water Company to take and hold the property of the plants that it consolidates with its own, and to operate the same, as if they had been constructed and were being operated under its own charter.

Acts 1889, Chap.——. See Appendix.

Moreover, the exemption from regulation is not transferable without express authority, even where it clearly exists.

St. L. & C. Co. vs. Gill, 156 U. S., 656-7. 39 L. Ed., 570.

Morgan vs. Louisiana, 93 U. S., 217. 23 L. Ed., 860.

Wilson vs. Gaines, 103 U. S., 417. 26 L. Ed., 401.

Railroad vs. Miller, 114 U. S., 176. 29 L. Ed., 121.

Covington vs. Sandford, 164 U. S., 578. 41 L. Ed., 564.

However, the contract between Wheeler & Parks and North Knoxville provided that that plant should be constructed under a charter to be obtained under the same law as that of the Water Company. The contract provided that the consumers of water in that municipality should be charged for water at a rate "not exceeding the rates contained in the following schedule;" then follows a schedule of annual rates for both fixtures and meters. It is further provided in this contract that water shall be furnished "subject to all reasonable requirements of the Town Council of North Knoxville," and upon no less favorable terms than shall from time to time govern its use in the City of Knoxville.

The contract between West Knoxville and the Lonsdale-Beaumont Water Company, of September 17, 1892, provides that private consumers shall not be charged for water furnished "exceeding the following maximum annual rates, — these rates, how-

ever, to be subject to 10 per cent. discount on all bills made, except those where water is metered or used for fire protection, mechanical or manufacturing purposes, if settled within ten days of their date." Then follows a schedule of annual rates for fixtures and meters.

Record, p. 66.

From these provisions it appears that the parties have not stipulated or undertaken to stipulate for anything more than a maximum rate for water to be furnished to private consumers. The question for determination is whether such a stipulation constitutes an irrevocable contract with the Water Company that it shall have the right to charge that rate, free from regulation by the City, however just or necessary that regulation may become, for the full term of its charter existence of thirty years.

In ascertaining the true meaning and effect of these several provisions, it is well settled both by Federal and State decisions, that the strictest rule of construction in favor of the City and against the Water Company should be adopted.

Ga. R. R. & Banking Co. vs. Smith, 128 U. S., 174. 32 Lawyer's Edition, 378.

Stone vs. Farmer's Loan & Trust Co., 116 U. S., 325. 29 Lawyer's Edition, 642.

Street Railway Co. vs. Africa, 100 Tenn., 44.

Turnpike Co. vs. Montgomery County, 100 Tenn., 421.

In the construction of such contracts, all doubts are to be resolved in favor of the public, and this rule applies with equal force, whether the contract is made directly with the State, or with a municipality, to whom the power to make such contract has been delegated by the Legislature.

It must be presumed in construing these provisions that each corporation was cognizant not only of its own powers and capacity to contract, but of those of the corporation with which it contracted. All persons contracting with a corporation must, at their peril, take notice of the powers and capacity of the corporation with which they contract. It must be likewise presumed that both corporations had in view these powers and capacities to contract,

and that they intended to make a legal contract within those powers and capacities. Much weight has been given to this fact in the cases construing contracts of this character, notably in the *Illinois Water Co. Cases, supra.*

Now at the dates of these contracts it must have been known to both corporations that the law and the charters of the contracting parties authorized, but did not command or require, as in the Illinois cases, the Water Company to contract with the City for water furnished to itself, and with the inhabitants for water furnished to them individually; that the inhabitants were not required to accept a water supply from the Water Company, but might get it from other sources, if they chose; that the right of the Water Company to furnish the inhabitants of the City with water was not an exclusive one, and that there was an express provision that the City should have the right to regulate the price of water to be furnished. These facts were before the minds of the contracting parties. Reading the contract in the light of these provisions of the law, it seems clear that they could not have intended, by fixing a maximum rate, to make an irrevocable agreement that the Water Company should have the right to charge for the full term of its existence, this rate, at its option, free from regulation by the City. The language of the contract does not purport to make or create any such contract. The rate fixed in the original contract of 1882, which is affirmed by the contract of 1899, was a maximum of five cents per 100 gallons. The schedule of rates adopted by the Water Company shows that by far the larger number of services were for water furnished at fixture rates, and not by the gallon. Treating it as a contract, this maximum could apply only where water was furnished by the gallon and through meters, and would not cover the whole subject of rates. There is no means provided of ascertaining the number of gallons furnished at fixture rates. This indicates the meaning and purpose of this provision.

It is to be observed, too, that under that contract the Water Company stipulates to furnish the City water by the hydrant, but without measurement, for certain hydrant rentals, while a differ-

ent provision is made as to private consumers. But even where a schedule is set out in the contracts or ordinances, it is a schedule of annual rates, which the Company itself fixes and in its rules and regulations reserves the right to change, even during the year for which it contracts to furnish water to private consumers.

Neither the City nor the Water Company has treated this fixing of a maximum rate as authorizing the Water Company to charge that rate, whether it be reasonable or not, and without regulation by the City. In the rates fixed by the Water Company, this maximum has never been insisted upon. The present rates of the Water Company are below this maximum. The City has been sparing and conservative in the exercise of its power to regulate the rates of this Water Company, but it has not hesitated to make such regulations when conditions seemed to warrant or require it.

As already stated, the City did, in 1895, when unjust meter rates were promulgated, proceed to exercise its power, and to correct the rates of the Water Company, and in so far as this record discloses, without protest on the part of the Water Company. And again, in 1901, when the Water Company had for six years maintained the same rates, and the population of the City, as well as the business and income of the Water Company, had greatly increased, the City passed an ordinance again regulating the rates of this Company, and slightly reducing them and equalizing them.

The original theory of the defense against this ordinance was that the ordinance was unreasonable, oppressive and confiscatory. But that was abandoned in the State Court. As already stated, the Water Company, in fixing a schedule of rates, has made them annual, not permanent, and in contracting with private consumers has limited the contract to a term of one year, and has reserved in its contracts for that term the right to change its rates and regulations. It has never had and does not now assume to have any permanent contracts with consumers, fixing rates for the full term of its existence. It has never undertaken to make any such contracts with private consumers.

Bearing in mind that this maximum rate is contained in the stipulations of the Water Company, and is a restraint upon its powers, and not upon those of the City, the meaning of this stipulation is clear. The Water Company, independent of any stipulation on the subject, would have the right to charge reasonable rates, thereby meaning such rates as would render a fair return to those who invested in the plant. By consenting to these maximum rates, it stipulates that it will furnish water to the inhabitants of the City of Knoxville at rates not exceeding the maximum, whether those rates shall prove remunerative to the Water Company or not. In other words, it agrees, on its part, that if higher rates should become necessary, to render the plant remunerative to its investors, that it relinquishes its right to increase the rates above this maximum limit.

In some of the cases it has been said as an argument against this construction of a maximum rate and the power of the City to regulate rates, that it would be unreasonable to suppose that parties, investors in such plant, would be willing to venture their means subject to such conditions, but the easy answer to such argument is, that such investors are at liberty to accept or reject a franchise of this sort offered by the State or a municipality, and if they accept it upon the terms of such offer, it becomes a contract by the terms and conditions and limitations of which they must abide. Parties who voluntarily enter into a contract, knowing its conditions, have no right to complain of its hardships. The State or the municipality offers franchises upon certain conditions. No person is compelled to accept them upon those conditions, but whoever accepts them must faithfully comply with the terms and conditions of their contract.

It may be remarked that it would be no more injudicious and unwise for the investors in this case to risk their capital in an enterprise which is subject to public control, than it would be for a City to place its inhabitants at the mercy of a private corporation, and especially of a corporation whose nature and business gives it a monopoly, and frees it from competition. The power of regulation is not an arbitrary one, but must be exercised in

a just and reasonable manner, and the Courts will compel this to be done. As much cannot be said of the arbitrary action of a private corporation protected by an irrevocable contract, relieving it from regulation by public authorities.

The Supreme Court of the State has sustained the construction of this contract here contended for in an elaborate opinion, which will be found in the record. This opinion is in accord with the State and Federal cases, some of which will be reviewed in this connection.

In *Ragan vs. Buffat, 9 Lea. 600*, the Supreme Court of Tennessee held that a railroad company was not exempt from regulation of its rates by a provision in its charter "that the charge for transportation and conveyance shall not exceed 35 cents per 100 pounds of heavy articles, and 10 cents per cubic foot on articles of measureme for 100 miles, and 5 cents a mile for passengers." The railroad company sought in that case to avoid the effect of a statute, subsequently enacted, regulating rates, upon the ground that said provision in its charter constituted a contract, the obligation of which could not be violated for the rates therein stipulated. The Court said: "We are of opinion that no such intent appears in the language of our statute; that the object was to fix a maximum charge, beyond which the companies could not go, and to leave the tariff of charges within that limit to the companies, subject to the rules of the common law and the regulating powers of the Courts and the Legislature." This case was decided in 1882, the year in which the Water Company obtained its charter, and has never since been questioned.

The clause of the Railroad Company's charter construed in that case is one that is common to the railroads of Tennessee. Since that opinion was rendered the Legislature of Tennessee has created a Railroad Commission for the regulation of the rates of railroad companies.

In *Ga. R. R. & Banking Co. vs. Smith, 128 U. S., 174; 32 Lawyer's Edition, 378*, the Railroad contested the right of the State of Georgia, through its Railroad Commision, to regulate and reduce its rates by an Act passed subsequent to the granting of

its charter, by reason of the provision in its charter, constituting, as it insisted, a contract, which would be thereby violated by the statute, "that the charge for transportation or conveyance shall not exceed 50 cents per 100 pounds on heavy articles and 10 cents per cubic foot on articles of measurement, for every 100 miles, and 5 cents per mile for every passenger."

This Court, Mr. Justice Field rendering the opinion, said: "It would require much clearer language than this to justify us in holding that, notwithstanding any altered conditions of the country in the future, the Legislature had, in 1833, contracted that the Company might, for all time, charge rates for the transportation of persons and property over its lines, up to the limits therein designated."

The Court, after stating that an explicit contract, exempting a corporation from regulation of its rates, would be recognized, adds: "But to effect this result, the exemption must appear by such clear and unmistakable language, that it cannot be reasonably construed consistent with the reservation of the power by the State. There is no such language in the present case."

In *Osborne vs. San Diego Land & Town Co., 178 U. S., 22; 44 Lawyer's Edition, 962*, this Court, Mr. Justice McKenna, delivering the opinion, held that the annual rates first fixed by a water company in a contract providing that the annual rates shall "be fixed by the party of the first part (water company) as allowed by law," did not constitute an irrevocable contract for the rates first fixed, so as to prevent future regulation thereof.

In the case of *Freeport Water Co. vs. Freeport, 180 U. S., 587; 45 Lawyer's Edition, 679*, the contract was much more favorable to the Water Company than that involved in this case. The contest in that case and in the case of *Danville Water Company vs. Danville, 180 U. S., 619; 45 Lawyer's Edition, 696*, determined at the same time, was over the right of the cities of Freeport and Danville to reduce the hydrant rental contracted to be paid by said cities respectively to the water companies during the charter period of their existence, for water to be furnished the city itself. These cases did not involve the question of the regulation of rates

for water furnished to private consumers. This Court was closely divided upon the question involved in those cases, but determined by a majority opinion that the cities had the right to regulate and reduce the hydrant rentals, under the laws of Illinois, under which the water companies had been chartered, authorizing cities and villages to contract with incorporated companies for a supply of water for public use, for a period of thirty years, and likewise to levy a tax upon the taxable property of their inhabitants to pay for this water supply, and likewise to prescribe by ordinance maximum rates and charges for the supply of water furnished, such rates to be just and reasonable.

The difference between that case and the one at bar is palpable. The Illinois statutes authorized only the City to contract for water for itself and its inhabitants, and to provide by public taxation to pay for same. The contest in that case was over the power of the City to repudiate its explicit contract to pay stipulated hydrant rentals for water furnished to itself. There was no reservation in the Illinois statutes under which the water companies were chartered, conferring upon cities the express power to regulate the price of water. In all these respects those cases are distinguishable from the one under consideration. It is true that in the case of *Rogers Park Water Company vs. Fergus, 180 U. S., 624; 45 Lawyer's Edition, 702,* the question was between the water company and a private consumer, but this latter case is distinguishable from the one under consideration in all of the above respects, except one, to-wit, that it does not involve the hydrant rental contract.

As sustaining the construction of the contract contended for in this case, see:

R. R. vs. West Va. Trans. Co., 25 West Va., 324.

Ruggles vs. People, 91 Ill., 256.

R. R. vs. People, 95 Ill., 313.

City Gas Light Co. vs. Des Moines, 72 Fed. Rep., 829.

Whatever power of regulation the State possesses it may delegate to a City.

Atty. General vs. Old Colony R. R. Co., 160 Mass., 67.

Stone vs. Pensacola etc. Co., 29 Florida, 623.

And this has been done by the provisions of the Act of 1877, in the fullest possible manner.

The power of regulation is a continuing one, and not exhausted by a single exercise.

Province Bank vs. Billings, 4 Peters, 514.

Freeport Water Co. vs. Freeport, supra.

Rogers Park Water Co. vs. Fergus, supra.

The cases principally relied upon by the Water Company are easily distinguishable from the one under consideration.

In *Detroit vs. Detroit Citizen's Ry. Co., 184 U. S., 368; 46 Lawyer's Edition, 492,* the right of the City of Detroit to reduce the rates of fare of a street railway company by ordinance, below the rates that had been agreed upon by the City and the railway company, was denied, upon the ground that such ordinance violated the obligation of the contract between the City and the railway company.

The statutes of Michigan, under which the railway company was chartered, and by authority of which its contract with the City was made and its plant constructed, provided, in substance, that street railways might be constructed in cities, by consent of the corporate authorities, under such rules, regulations and conditions as should be prescribed by ordinance, as a condition to the granting of consent by the City; that after such consent had been given and accepted by the railway company the city should not have any power to revoke the same, or deprive the company of the rights and privileges so conferred, and further, that "the rates of fare which a street railway company may charge for the transportation of persons and passengers over the road, shall be established by agreement between such companies and the corporate authorities of the city or village where the road is located, and shall not be increased without the consent of such authorities."

By contract between the railway company, effected by ordinance, assented to by the company, it is provided that "the rate of fare for any distance shall not exceed 5 cents in any one car,

or on any one route named in this ordinance, except where cars or carriages shall be chartered for special purposes," etc.

In that case, it will be observed that the only contract authorized was between the Street Railway Company and the City. The statutes contemplated that the matter of rates should be a matter of contract, and that the city should make the contract for the inhabitants and thus protect them.

In distinguishing this case from that of *Ga. R. R. & Banking Co. vs. Smith, supra,* the Court said: "In the case at bar, however, the rates are fixed under the provisions of a statute, which declares that they shall be so fixed by agreement between the parties."

The statutes involved in that case clearly contemplated the making of an irrevocable contract between the city and the railway company. It was provided that the city should have no power of revocation. It was held that the rules, regulations and conditions which the city was authorized to impose upon granting consent did not embrace regulation of rates.

It is stated as a matter of some consequence that the city had acquiesced for thirty-three years in the contention of the railway company, without any offer on its part to exercise the power of regulation. These and other features distinguish that case from the one at bar. Here there is an express provision that the police powers of the City shall not be interfered with by the granting of the City's leave to the Water Company. To this an affirmative provision is added granting the City the express power to regulate the price of water. Here the Water Company is not only authorized to deal with the City, but with individual consumers, and hence the importance of reserving to the City the right to regulate the rates that might be demanded of individual consumers by the Water Company.

In *Los Angeles vs. Los Angeles City Water Co., 177 U. S., 558; 44 Lawyer's Edition, 886,* it was conceded that the City had the right to regulate the rates of the Water Company, but a limit or minimum was placed upon that right of regulation. That was a stipulation by the City. The stipulation in this case is for a

maximum and by the Water Company. The stipulation in that case is one that would have been perhaps enforced by the Courts under their power to prevent unreasonable, oppressive or confiscatory rates, even if no contract had existed. The contract entered into in that case was ratified and confirmed by legislative authority. It was held that such a contract could not be violated by subsequent action of the public authorities.

In the case of *Old Colony Trust Co. vs. Atlanta, 83 Fed. Rep., 39*, it was simply held that the City of Atlanta had not been invested with the power to regulate street car fares, and therefore its action was unauthorized and void. It will be found on an examination of the cases, that none of them are in conflict with the City's contention in this case.

But whatever may have been the capacity of the parties to contract, and whatever may have been the contract entered into by them, such contract as was made was revocable, at the will and pleasure of the Legislature, or by the municipality, under the provision of the constitution and laws of the State, as well as by the terms of the Water Company's charter. The power to revoke or annul the contract, being the greater, includes the power necessarily to make reasonable regulation of rates, and the exercise of the power of regulation cannot therefore operate to divest the Water Company of any vested right. Its right is to charge reasonable rates, and it is the right of the State to exact reasonable rates. The general incorporation statute of the State, as well as the Constitution of 1870, provides that all charters shall be subject to modification, amendment or repeal. The Water Company's charter contains the clause on its face that "the right is reserved to repeal, annul or modify this charter."

Record, p. 53.

In *Ferguson vs. Bank, 3 Sneed, 628-9*, decided in 1856, and prior to any constitutional provision on the subject, the Supreme Court of the State of Tennessee said: "But we consider it equally clear that the Legislature may reserve the right to modify, amend or repeal a charter." (Citing authorities.)

"This reservation then became a part of the contract and the

charter is accepted with that as one of its terms and provisions. This exercise, therefore, of this power to amend or repeal, is no infraction of the contract in such a case, but is in exact conformity to it. The right of the Legislature to insert this form in its charters is not debatable at this day.

"Vested rights must be strongly maintained by the Courts, as against the Legislature and all other authorities. The safety of every man's rights of all kinds depends upon a firm adherence to this principle, and the least departure from it would be just cause for alarm. But what are the rights of men or corporations and the rules of construing, their contracts must also be regulated by the rules of law. A contract of any kind with various provisions must be taken as a whole, and all its terms are to have equal vigor, according to the meaning and intent of the parties."

This power to repeal, annul or modify charters has been very generally reserved in the legislation of the States granting charters, whether by special or general laws, since the decision of the Dartmouth College case, in 1819. It was suggested in the opinion Mr. Justice Story in that case that "when the Legislature was enacting a charter for a corporation, a provision in the statute reserving to the Legislafure the right to amend or repeal it, *must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract and could not therefore impair its obligation.*"

In *Greenwood vs. Union Freight R. R. Co., 105 U. S., 13-24: 26 Lawyer's Edition, 965,* Mr. Justice Miller, after quoting this language with approval, says: "This history of the reservation clause in Acts of incorporation supports our proposition that whatever right, franchise or power in a corporation depends for its existence upon the granting clause of a charter, is lost by its repeal." He cites numerous cases in support of this proposition.

It has been held that the power to alter or modify is a continuing one, not exhausted by one alteration or exercise.

R. R. Co. vs. Commissioners, 27 N. J., 228.
People vs. Hills, 46 Barbara, 340.
Proprietors vs. Haskel, 7 Maine 474.

Under statutory provisions authorizing the repeal, amendment or modification of charters, there have been numerous decisions of the State and Federal Courts.

"A statute regulating the rates of a railroad company is within the reserve power to alter its charter."

Capital City Gas Light Co. vs. Des Moines, 72 Federal Reporter, p. 829.

American Coal Co. vs. Consolidated Coal Co., 46 Md., 15.

Shields vs. State, 26 Ohio State Rep., 86. Affirmed in 95 U. S., 319. 24 Lawyer's Edition, 357.

R. R. vs. Ryan, 56 Ark., 245.

"And the Legislature, under the power reserved in a railroad charter to at any time hereafter alter, modify or repeal this Act, has the right to fix the rates of fares which may be charged by such company, without being subject to the charge of impairing the obligation of contract."

Beardsley vs. R. R. Co., 15 App. Div., (N. Y.) 251.

"Where the charter of a railroad company empowers it to exact tolls, at its discretion, an Act of the Legislature restricting the rates that may be taken, is an alteration of the charter within the scope of a reservation of power to alter or repeal."

Atty. General vs. R. R. Co., 35 Wis., 425.

In a note to *Greenwood vs. Union St. Ry. Co., supra,* numerous cases are cited for the proposition that, if the power is reserved, the Legislature may repeal, alter, or modify a charter by a general statute, or it may be done by a change in the constitution, and a creditor cannot object, nor is the consent of the corporation necessary. This reserve power of the State may be exercised, either by the State direct or through such instrumentalities as commissions or municipalities.

"Where a power is reserved to alter a charter, the State may prescribe the manner of the exercise of such a power."

In Re Reciprocity, 22 N. Y., 9. 29 Barber, 369. 17 Howard Pr., 323.

"A statute empowering city councils to regulate the price to be charged for gas may constitute a valid exercise of the power to alter the charter of a gas company."

State Ex Rel. vs. Cincinnati Gas Light & Coke Co., 18 Ohio State Reports, p. 262.

"An Act creating a State Corporation Commission and giving it the right to regulate railroad rates, is an exercise of the reserve power to amend or repeal the charter of a railroad company, giving it the exclusive right to regulate rates or charges."

Matthews vs. Corporation Commissioners, 97 Fed. Rep., 400.

"Charter power to demand such sums as a corporation may deem reasonable for carrying freight and passengers, provided they are reasonable, does not preclude the Legislature from afterwards fixing the maximum of charges, even though there is no reservation of power to alter or repeal the charter."

R. R. Co. vs. Transportation Co., 25 West Va., 324.

"An implied restriction that the corporation, in fixing the rates of toll, shall make them reasonable, is held to exist in a charter giving the power to the corporation to fix its own rates, therefore the Legislature has the same power to say what are reasonable maximum charges as if the charter was silent on that point."

Ruggles vs. People, 91 Ill., 256.
R. R. Co. vs. People, 95 Ill., 313.

"So a contract right of a gas company by its charter to charge and collect reasonable rates is not impaired by a delegation of authority to the City to fix reasonable prices for gas."

Gas Light Co. vs. Des Moines, 72 Fed. Rep., 829.

From these decisions it seems to follow as a necessary result that the State had, under its reserve power to repeal or modify this Water Company's charter, a clear right to regulate its rates in a reasonable manner. The State likewise had the right to delegate this power to a municipality and exercise it in that manner. In fact it is the usual method of exercising the power of regulation to delegate it to Boards and municipalities. See also:

Railroad vs. Adams, 180 U. S., 1.
Bank vs. Owenboro, 173 U. S., 636.

The existence of this power of repeal, and hence of regulation, is declared on the face of the Water Company's charter, and its

delegation to the City is made in explicit language in the charter Act, and is a condition of the very existence of the Water Company. This reserve power, therefore, became a part and condition not only of the charter contract between the State and the Water Company, but of any and every contract entered into by the City and the Water Company. The right of the City to regulate the charges to consumers of water to be furnished to them by this Water Company is a matter of serious consequence to the City and its inhabitants. The City claims only the power of reasonable regulation. It is not denied in this record that the regulation made by the ordinance assailed was reasonable. The highest of the present rates of the Water Company are only one-half of the maximum amount that it was authorized to charge under the original contract of 1882.

If the Water Company's insistence that it is free from regulation under the maximum fixed by that contract is correct, then if its rates are to be controlled by that contract, it may double its present rates. Not only so, but whatever conditions may occur in the future, and however much its revenue may increase, by reason of increase in population and of services, it will be free from any power on the part of the City to compel it to charge reasonable rates.

If the power of regulation exists on the part of the City, it cannot be abused, or arbitrarily or unreasonably exercised. If such attempt is made the Courts will intervene.

(2) The contention that the ordinance of March 30, 1901, operates to deprive the Water Company of its property or other vested right, without due process of law, is well answered by the opinion of the Supreme Court of the State.

The position that the rates fixed by that ordinance were unreasonable, oppressive and confiscatory, was abandoned before the State Court. This is a concession for the purposes of this case that the rates in question are reasonable. It is admitted in the briefs of counsel that the reductions were "small" or "slight." The City exercised its power with moderation. There is no proof that the City did not give the Water Company notice and a hearing be-

fore passing the ordinance. And none that the City did not make proper investigation. But this matter is not material, inasmuch as the Water Company has the right, after the ordinance goes into effect, or even before, to have the reasonableness of the rates investigated, and passed upon by the Courts. After presenting that question in this case by the pleadings, it was abandoned in the proof.

The contention that the ordinance affected the contracts of the Water Company with its consumers is without foundation. The contract with the consumer involved in this case is dated September 1, 1896, and under the rules and regulations of the Water Company ran for one year and was then subject to termination at the option of the consumer. Besides, upon its face, the Water Company reserves the power to practically annul the contract at its own pleasure, by any new rules or regulations that it might adopt. Most of these questions were raised and passed upon by this Court, adversely to the contention of the Water Company, in the case of *Freeport Water Co. vs. Freeport, supra.*

The objection that the City is judge in its own case in the regulation of water rates, is easily met. In the absence of any contract the power of the State to regulate, and the power of the City to whom the right to regulate is delegated, is unquestionable. It is a part of the contract in this case that the City should be arbitrator in this matter. The right to regulate is not only not bargained away, but expressly reserved and expressly conferred upon the City. The Water Company was under no obligation to accept its franchise upon these terms, but, having done so, it has no right to complain. The City has been exceedingly considerate and moderate in its exercise of this power. Its reduction of the rates agreed by the Water Company to be reasonable, and fixed by itself six years ago, is "slight" or "small," by the admission of its counsel. The City has not undertaken to regulate the hydrant rental rates at all, but merely to regulate the rates between the Water Company and private consumers. The question is between the regulation or establishment of rates by the City or by the

Water Company's Directory. It would seem that the public authorities could be as well trusted in this matter as the Directory of the Water Company.

J. W. CULTON,
City Attorney.

PICKLE & TURNER, *of Counsel.*

Geo. W. Pickle.

APPENDIX "A"

1. The City of Knoxville was incorporated by an Act of the Legislature, passed October 27, 1815. This Act contained no provision bearing upon the question of water supply for said City.

2. By an amendment of this Act, passed January 19, 1838, the following provisions, and none other, were made in reference to the question of water supply for said City:

"SEC. 3. Be it enacted, that the Mayor and Aldermen of said Corporation be, and they are hereby authorized to borrow a sum of money, not exceeding fifty thousand dollars, for the purpose of erecting waterworks and supplying said town with water; and the Mayor and Aldermen are hereby authorized to make and issue bonds and script of said corporation for the payment of said sum of money.

"SEC. 4. Be it enacted, that the Mayor and Aldermen of said corporation shall have power and authority to protect from injury by adequate penalties to be imposed by the laws or ordinances of the said Mayor and Aldermen, the pipes, hydrants, or fixtures, buildings or improvements belonging to or in any wise appertaining to said waterworks, whether within or without the limits of said corporation.

'SEC. 5. Be it enacted, that if any person or persons shall wilfully or maliciously cut, destroy or injure in any way whatever, the pipes, hydrants, or fixtures, buildings or improvements belonging to or in any wise appertaining to said waterworks, whether within or without the corporate limits of said corporation, in addition to the penaltes that he, she or they may be liable to under the provisions of the fourth section of this Act, he, she, or they shall be further liable to indictment or presentment in said Mayor's Court, and on conviction of said offense, shall be fined in a sum not less than five nor more than fifty dollars, and imprisoned not exceeding six months."

3. By another amendment of the charter of said City, passed December 7, 1866, the following provision was made:

"SEC. 1. Be it enacted by the General Assembly of the State of Tennessee, that the Mayor and Aldermen of the City of Knoxville shall have and exercise all of the rights, powers, authorities and privileges which have heretofore been conferred by law upon the City of Nashville."

It will be observed that this last amendment gave to the City of Knoxville all of the rights, powers, authorities and privileges which had been conferred upon the City of Nashville.

4. The City of Nashville was incorporated by an Act passed January 31, 1848, found in the Session Acts of 1847-8, Ch. 68, pages 266-71.

The provisions of this Act relating to the question of water supply was as follows: Sec. 1 of the Act authorized the City, among other things, to "receive and hold property, real and personal, beyond the limits of the City, to be used for the burial of the dead, for the erection of waterworks, for the establishment of a hospital, for a poor house, workhouse, or house of correction," etc.

Sec. 6 of the Act, which defines in 37 sub-sections the powers of the City, provides as follows: Sub.-Sec. 8: "To provide the City with water by waterworks, within or beyond the boundaries of the City." Sub-Sec. 24: "To provide for the prevention and extinguishment of fires, to organize and establish fire companies," etc.

Section 8 of the Act provides that the General Assembly "may at any time alter, amend, or repeal this charter."

There are no other provisions in this Act on the subject of waterworks or water supply.

The City of Nashville was re-incorporated by an Act passed February 18, 1858, being Ch. 69 of the Session Acts of 1857-8, Sections 12-17 inclusive.

Sec. 12 of this Act provides that said City "may purchase, receive and hold property, real and personal, beyond the limits of the City, to be used for the burial of the dead, for the erection of waterworks," etc.

There is no other provision in this or any other Act granting or amending the charter of the City of Nashville, passed prior to the Act of 1866, above quoted, by which the City of Knoxville was invested with the rights, powers, authorities and privileges of the City of Nashville.

5. By an Act passed June 10, 1885, being Ch. 8 of the

Session Acts of an extra session of that year, all the Acts chartering the City of Knoxville were incorporated into one statute, and amended:

Sec. 2 of this Act provides that the City "may purchase, receive and hold property, real and personal, within or beyond the limits of the City to be used for the burial of the dead, for the erection of waterworks," etc.

Sec. 18 of this Act defines the powers of the corporation in numerous sub-sections.

Sub-Sec. 7 reads as follows: "To provide the City with water by waterworks, within or beyond the boundaries of the City, or provide for supplying the City with water otherwise, and to provide for the prevention and extinguishment of fires, and to organize and establish fire companies."

Sub-Sec. 29. reads: "To grant a right of way through the streets, avenues, and squares of said City for the purpose of street or other railroads, and for such other purposes as the Board of Mayor and Aldermen may provide by ordinance, provided the Board of Mayor and Aldermen shall not grant the exclusive right to the use of the streets, for any purpose, to any one person, company or corporation."

Sub-Sec. 33 reads: "To take and appropriate in the manner hereinafter provided, grounds adjacent to the corporation line for waterworks purposes, for pumping station, reservoir, right of way for water pipes, and a site for a pumping station, upon the payment of damages. To exercise the right conferred by this subsection, the Mayor and City Council shall by ordinance designate the grounds, and instruct the City Attorney to institute proceedings provided for in Secs. 1325-1348 inclusive of the Code of Tennessee; Milligan & Vertrees Code 1549-1572 inclusive."

These are all the provisions of this Act relating to water supply for said City, and there is no other legislation on the subject.

It will be observed that under this legislation the City of Knoxville had no power prior to 1885 to provide for waterworks or water supply in any other manner than by the erection thereof, by the City, and that it had no power since 1885 to grant an exclusive right, if any right at all, to any company to occupy the streets of the City with pipes and mains for the purpose of supplying its inhabitants with water.

APPENDIX "B"

"An Act to empower Water Companies in this State to acquire by purchase or otherwise the property and working franchises of other Water Companies.

"SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, that in all cases where there are two water companies chartered by special law, or under the general laws of this State, in any of the towns or cities of this State, and it becomes necessary or desirable for one of said companies to acquire, by purchase or otherwise, the property and working franchises of the other corporation, in order to enable it to better carry out its duties under its charter and to comply with any contract or contracts which it may have entered into for public and private supply of the city or town in which it is located and the inhabitants thereof, that such corporation shall have, by and with the consent and approval of the municipal authorities in the town or city in which such corporations are located, the power, and is hereby authorized to acquire, by purchase or otherwise, the property and working franchises of such other corporation, including its realty, its pipes, all its connections, its engines, its pumps, and all else that pertains and belongs to such other corporation, as a part of its corporate property, the same to be held, owned, enjoyed, and operated by the purchasing Company under its own charter, just as if it had originaly built or acquired said property under its own charter; provided, that nothing in this Act shall authorize one water company to purchase the corporate property and working franchises of another company when the same are being operated and run in competition with each other.

"SEC. 2. Be it further enacted, that this Act take effect from and after its passage, the public welfare requiring it.

"Passed March 30, 1889."

Session Acts 1889, Chap. 106, p. 316.

Supreme Court of the United States.

No. 212.—October Term, 1902.

The Knoxville Water Company, Plaintiff in Error, vs. The Mayor and Aldermen of the City of Knoxville. } In error to the Supreme Court of the State of Tennessee.

[March 23, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a complaint for a penalty against the Knoxville Water Company for charging and collecting water rates in excess of the rates fixed by the ordinances of the city of Knoxville. The water company pleaded that the ordinances relied on violated the obligation of contracts between the city and itself, and deprived it of its property and liberty without due process of law, and so was contrary to the Constitution of the United States. The case was tried on appeal before a single judge, who made a special finding of facts, on which the Supreme Court of the State entered a final judgment for the plaintiff. 107 Tenn. 647. The company then brought the constitutional questions here by writ of error.

The water company was incorporated in Tennessee in 1882 to construct waterworks in or near Knoxville, with power to contract with the city and inhabitants for the supply of water, and to "charge such prices for the same as may be agreed upon between said company and said parties." This incorporation was under a general act which provides as follows: "And this Act is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company." Acts of 1877, c. 104, § 2. In the same year, 1882, the company made a contract with the city by which it agreed to construct its works and to furnish water, the city gave the company exclusive privileges for thirty years and agreed to make certain payments, &c., and it was mutually agreed, among other things, that, after fifteen years, the city should have the right to purchase the works at a price to be fixed by appraisers if not agreed upon. The contract contained three distinct parts, first, the promises of the company; next, those of the city, and last, the mutual undertakings. In the first part the company

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undertook as follows: "Said company will supply private consumers with water at a rate not to exceed five cents per one hundred gallons," subject to an immaterial proviso. These are the words relied on by the company. They are assumed to contain an implied undertaking on the part of the city not to interfere with the company in establishing rates within the contract limits.

After the contract was made the company built its works and furnished water. Later it took over contracts between two other concerns and neighboring towns and consolidated with one of the other concerns, which was a corporation. The towns on their side were made a part of Knoxville and the whole water supply was brought under the original contract. But these facts do not alter or affect the present case and need not be stated in detail. The company went on furnishing water and charging rates within the contract limit, to the satisfaction of the city, it may be assumed, until within a year or two, when the city passed an ordinance which cuts down the rates which the company had been charging, and asserts its right to charge.

The trouble at the bottom of the company's case is that the supposed contract on which it is founded does not exist. If such a contract had been intended it was far too important to be left to implication. In form the words are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See *Georgia Railroad & Banking Co.* v. *Smith*, 128 U. S. 174; *Ragan* v. *Aiken*, 9 Lea, 609. They are words of a company which was notified by the act which called it into being of the power expressly conferred upon the city "by ordinance to regulate the price of water" which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities cannot complain of them or repudiate them, nor can the company which they have formed. *Rockport Water Co.* v. *Rockport*, 161 Mass. 279. This consideration answers a portion of the company's argument as to its rights under the Fourteenth Amendment, and makes it unnecessary to consider whether the regulation of water rates is properly to be classed as a police power. It also reinforces our interpretation of the instrument upon which the company found its claim.

We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U. S. 368. But in that case the rate was fixed by an ordinance which was the language of the city, the ordinance was under a statute which declared that the rates should be established by agreement between the

city and the railway company, and neither statute nor ordinance reserved a power to the city to alter rates. In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statutes in force, the city could do it if it tried. The contracts fixing prices authorized by the statute were contracts between the company and its customers, not, as in the case of the railway company, a single contract between the company and the city, and were subject to the power to regulate them given to the city by the same statute. We assume that the charter of the city authorized it to contract, but it was not so specific as the statute which we have quoted, and added nothing to the power conferred by that law.

With the construction which we give the contract between the company and the city the argument that the obligation of that contract is impaired must fall. It is argued here that the reduction of rates is not reasonable, and is or may be taking a first step towards a compulsory purchase of the company's plant at an unfairly low price, by cutting down its value. We may assume with the Supreme Court of Tennessee that if rates were reduced unreasonably a judicial remedy would be found. We may assume further that an attempt to affect the price of the company's plant in that way, if the city should elect to purchase, would not be allowed to succeed. But no such questions are before us. There is no evidence and no presumption that the ordinance rates were unreasonable or were fixed with sinister intent. The judgment of the Supreme Court of Tennessee states that the question was not considered by it, and is expressed to be without prejudice to later litigation concerning the reasonableness of the rates. If the question is open here it is open only in form, and no error is shown.

A part of the argument was directed against the validity of the ordinance because of a failure to notify an alderman who was out of the State, but we see no sufficient ground for undertaking to revise the judgment of the State court on that point.

Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts. *New Orleans* v. *New Orleans Waterworks Co.*, 142 U. S. 79, 91, 92; *Browne* v. *Turner*, 176 Mass. 9, 15. The contracts recognize the possibility of change, as the agreement is to pay for the water in accordance with the rates "now or hereafter in force." This constitutional objection hardly is open on the pleadings, but we have

given the company the benefit of the doubt so far as to consider it. We discover no error in the record, and the judgment of the Supreme Court of Tennessee must be affirmed.

Judgment affirmed.

Mr. Justice WHITE, Mr. Justice MCKENNA and Mr. Justice DAY, not having been present at the argument, took no part in the decision of the case.

True copy.

Test:

Clerk Supreme Court, U. S.